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PUBLISHERS' ANNOUNCEMENT

MR. EDWARD F. GEORGE, LL.B., has been appointed Joint Editor of *The Conveyancer and Property Lawyer*. Mr. George, who was admitted a solicitor in 1937, has assumed responsibility for the magazine; MR. DONALD C. L. CREE will continue to edit the precedents.

CONVEYANCER'S NOTEBOOK

Service Occupancy.—Two forms of licence were published in Volume 14, pp. 402 and 404, designed for use where servants occupy living accommodation belonging to their employers. Form 2 does not provide for any money payment; Form 4 provides for the deduction against wages of a weekly sum which is regarded as the equivalent of the rent of the premises. As we mentioned earlier this year (*ante*, p. 44) the Controller of Stamps has been insisting on certain licences in these and similar forms being stamped as though they were leases.

From the correspondence we have received it does not appear that the stamping has been consistent. In some cases instruments have been stamped 6d. as licences, in others *ad valorem* as leases and in yet others 6d. plus bond covenant duty. The Board of Inland Revenue are advised that Form 4 is *prima facie* a lease and Form 2 a licence, but are unable to give any general ruling; each individual case must be considered " on its particular facts ".

Practitioners have been disturbed in case a particular instrument should be construed by the Court as a lease because it has

been stamped as such. We think that such fears are quite unfounded. It is the nature of the instrument that determines the amount of the stamp, not *vice versa*. A consistently wrong administration of the Stamp Act by the Inland Revenue cannot absolve the Court from adjudicating upon a particular instrument when it comes before it (*Re Robb's Contract*, [1941] Ch. 463, 478). There are at least five stamping alternatives: (i) the instrument could be engrossed on stamped paper; (ii) it could be stamped on behalf of the licensor after signature; (iii) it could be stamped on behalf of the licensee after signature; (iv) it could be adjudicated; or (v) stamping could be omitted and the instrument could be admitted in evidence on payment of the duty, penalty and statutory fee of £1. Obviously it would be illogical for any particular instrument to be construed in accordance not merely with the stamp it bears but with the mode of stamping. In the last case the Court would construe the instrument and the correct stamp would be attracted accordingly. In the case of adjudication the instrument is deemed properly stamped, that is, it is treated as stamped with the correct amount even if this is not so. It cannot be inferred that the parties acquiesced in the amount of the stamp; indeed the true position might be quite the reverse. In cases (ii) and (iii) one party after signature has acquiesced in a particular stamp (though it by no means follows that he agreed with the marker on the classification of the instrument), but, taken at its highest, why should the view of one party after completion of the transaction govern its construction? Only in the first case can we see any serious ground for argument and we cannot think that the construction of a document can turn on when it was stamped. This case, in practice, is likely to cause the least difficulty as we cannot imagine the employer's solicitor stamping the instrument voluntarily as though it were a lease.

We would add that we see no reason for differing from the draftsman of the two Forms that they are licences. The borderline between leases and licences where there is complete occupation of dwelling accommodation is not easy to determine and depends on the intention of the parties. Exclusive enjoyment is not the same thing as exclusive possession (*R.* v. *Smith* (1861), 30 L. J. (M. C.) 74, 76). Why should the defendants in *Minister of Health* v. *Bellotti*, [1944] K. B. 298, have been licensees except that that was what was intended?

In many cases of service occupancy the arrangement between the parties is either verbal or contained in a letter couched in informal language and, in such cases, all the surrounding circumstances have to be looked at. Where an employee is required to

occupy certain premises for the proper discharge of his duties, there is little difficulty in establishing that he is a licensee and not a tenant : *Ramsbottom* v. *Snelson*, [1948] 1 K. B. 473; *Thompsons (Funeral Furnishers), Ltd.* v. *Phillips*, [1945] 2 All E. R. 49. In other cases, it will, in general, be presumed that the occupier is a lessee, but it is a question of fact, and we can find no authority suggesting that, in the absence of some other provision inconsistent with the existence of a licence only, the specific agreement that the occupation does not give rise to a lease may be ignored.

Report of the Committee on the Law of Intestate Succession.— There is general agreement that the depreciation in the value of money since 1925 and the substantial increase in the cost of houses, particularly over the last few years, necessitate the revision of the laws of intestacy in favour of the surviving spouse. Accordingly it is no surprise that the unanimous report of the committee considering the subject recommends an increase in the statutory legacy from £1,000 to £5,000 where the deceased leaves a spouse and issue surviving. The committee also recommends a number of minor alterations : that the rate of interest on the statutory legacy be reduced to 4 per cent. and be paid out of income instead of capital; that the surviving spouse have an option to purchase the matrimonial home at the current market price to be ascertained from the estate duty valuation (the Chancellor's concession being ignored); and that she have the right to take her life interest in the form of capital ascertained according to tables to be scheduled to the necessary legislation. The last two recommendations are rather in the nature of extensions of sections 41 and 48 of the Administration of Estates Act, 1925. There will be little quarrel with the recommendations so far.

Where the deceased leaves a spouse but no issue, the changes suggested are more drastic and are likely to prove much more controversial. The surviving spouse's statutory legacy would be increased to £20,000 and she would receive one-half of the remaining estate absolutely if there were parents or brothers or sisters of the whole blood, or their issue, surviving. In all other cases the surviving spouse would receive the whole estate. It is easy to imagine cases where such provisions would bring about great inequity. If parents were to leave their estates to two sons equally and one of the sons were to die shortly after marriage, the surviving son would seem to have some moral claim even if the

estate of the son first dying were less than £20,000. If a wealthy parent of two half-brothers were to divide his estate equally between them and one of the half-brothers were to die intestate leaving a spouse, under the committee's proposals the other would take nothing on intestacy. It is reasonable that a widow should be properly provided for during her lifetime, but we can see no good grounds for capital derived from the husband's family eventually going to the wife's family or her family by a second marriage. We think that the suggested figure of £20,000 is too high and see no reason for excluding the other next of kin at present entitled; nor do we see why the surviving spouse should take an absolute interest in any part of the remaining estate. The statistics supplied by the Principal Probate Registry do not seem to support the committee's recommendations for cases where there are no issue.

The final recommendation that the Inheritance (Family Provision) Act, 1938, should be extended to cover intestacy is open to serious objection. In any case where there were " dependants ", the intestacy provisions would be open to revision by the Court. The hardship arising from infant children by an earlier marriage being left unprovided for by reason of the whole of the deceased's estate passing to the second spouse could quite easily be overcome by conferring on infant children a right to maintenance out of their parent's estate, as is done by some systems of law.

New Streets Act, 1951.—This Act is of some interest to conveyancers, although it will be some years before the full effect is felt. The main feature is to provide that before new buildings are erected on private streets the sum likely to be needed for street works shall be paid to the highway authority, or security given for it. When building plans are submitted under the building by-laws, the local authority must within a month of passing the plans require to be paid or secured to its satisfaction an amount to cover the estimated cost of street works which, if then carried out, would be apportioned to the plot on which the building is to be erected. There is provision for the sum to be reduced either by the local authority or, on appeal, by the Minister. There are a number of exemptions.

The sum deposited is retained by the local authority until the works are carried out. Then, the actual cost having been ascertained, the deposit, with simple interest at 3 per cent. (less tax), is set off against it and the balance paid by the then owner of the

land. In the unlikely event of the actual cost being less than the deposit with interest the balance is paid to the then owner.

If the deposit is secured by mortgage it is not to be deemed a prior mortgage for the purposes of the Building Societies Act, 1894, s. 13, so as to prevent a building society lending on the security of the land.

As a *quid pro quo* a majority of the frontagers can require the local authority to make up the street and "adopt" it, but this is subject to the local authority's obtaining the consent of the Minister under Defence Regulation 56A to the carrying out of the works.

The Act came into force on October 1. It applies to boroughs, other than metropolitan boroughs, and urban districts, and may be extended by Order to rural districts.

Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951.—The disturbance caused by the recall of Z reservists and others hardly justifies this Act of sixty-six sections, buttressed by the Reserve and Auxiliary Forces (Protection of Civil Interests) Rules, 1951 (S.I. No. 1401), and the Reserve and Auxiliary Forces (Protection of Civil Interests) (Business Premises) Regulations, 1951 (S.I. No. 1402). The Act came into force on August 1. Part I is similar to the Courts (Emergency Powers) Act and places restrictions on the execution of judgments and exercise of remedies against those adversely affected by their recall. We think it probable that the effect of this Part will be rather like that of the Courts (Emergency Powers) Act in the last stages of its life, a nuisance to practitioners without any corresponding benefit.

Part II deals with security of tenure of what is inelegantly described as the rented family residence. The protection afforded by the Rent Restrictions Acts and the Furnished Houses (Rent Control) Acts is extended. The protection is only given to servicemen recalled for more than three months and the period of protection is limited to the period of recall plus four months from the end of the service. The Act applies to premises which for one reason or another, *e.g.*, the rent being less than two-thirds of the rateable value or the landlord being the local authority or the Crown, are outside the present Rent Restrictions Acts. It is interesting to observe that, although Parliament found it too difficult to arrive at reasonable rents for the purpose of the Leasehold Property (Temporary Provisions) Act, 1951, it apparently had no difficulty in making provision for arriving at standard rents under this Act even in the case of rent free service occupancies.

Section 23 provides for unauthorised persons to represent servicemen who are abroad, an example of the introduction of *negotiorum gestio* into English law. Theoretically, difficulties might arise if the unauthorised agent acted in a way disapproved of by the serviceman, but in practice we think the Act is likely to be little used.

Part III deals with security of tenure of business premises and enables a serviceman tenant to apply to the county court for an extension of his lease or tenancy for the same period of protection as is prescribed in Part II. The landlord may serve a notice requiring him to elect whether to apply or not. Parts IV, V and VI deal with superannuation rights, civil remuneration and industrial life assurance policies and contributions to friendly societies, respectively.

Tithe Act, 1951.—The Tithe Act, 1951, which came into force on September 1 effects no important changes, but makes a number of minor amendments to the Tithe Act, 1936. The requirement that the Tithe Redemption Commission should prepare registers of annuities for all districts has been altered so as to enable the Commission to decide whether or not it will prepare a register for any particular district (section 1). Where particulars of tithe rentcharge have not been transmitted under section 5 of the Tithe Act, 1936, before September 1, the provisions for compensation in respect of the extinguishment thereof and for charging annuities in place thereof cease to have effect (section 2). The obligation on an owner of land disposing of or creating an estate interest in land subject to tithe redemption annuity to notify the Commission of the dealing is extended to any other person by whom an estate or interest is disposed of or created (section 5 (3)). Section 7 provides that registers, maps, etc., are to be open to public inspection.

PUBLISHERS' NOTICE

It is regretted that, owing to the continual rise in the cost of printing, paper, and overhead expenses, it has become necessary to increase the subscription rate of the *Conveyancer and Property Lawyer* to 35s. This rate will apply to subscriptions for 1952.

COVENANTS AGAINST ASSIGNMENT OR UNDERLETTING

By E. O. Walford, LL.D., Solicitor

The case of *Re Smith's Lease*, [1951] 1 All E. R. 346, the details of which are summarised below, serves to show how careful one must be if it is desired to prevent a lessee from assigning or underletting to a person selected by him or at least to have absolute control over any such assignment or underletting.

Law of Property Act, 1925, s. 144

One of the hurdles to be surmounted may be dismissed very briefly. It is provided by section 144 of the Law of Property Act, 1925 (re-enacting section 3 of the Conveyancing and Law of Property Act, 1892), in effect, that unless the lease contains an express provision to the contrary, a covenant, condition or agreement against assigning, underletting or parting with possession or disposing of the land or property leased without licence or consent is to be deemed to be subject to a proviso that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence.

It will be noted that the provision last mentioned did not prevent a landlord from stipulating for the payment of a fine or other collateral benefit as a condition of consent to the assignment or underletting, and did not in fact prevent the landlord from imposing additionally or alternatively such other terms as he thought fit; and it should be added that even if he imposed no such terms the landlord was free to exact a reasonable sum for legal or other expenses incurred in relation to the licence. Nor did the section prevent the landlord from prohibiting absolutely any assignment or underletting. It merely prevented the landlord from taking a "fine" or money as a condition of his consent unless he had expressly stipulated for the right to do so. The term "fine" was declared by section 205 (1) (xxiii) of the L. P. A., 1925, to include "a premium or foregift and any payment consideration or benefit in the nature of a fine premium or foregift". For cases on the meaning of the word "fine" in the above section, see *Evans* v. *Levy*, [1910] 1 Ch. 452; *Waite* v. *Jennings*, [1906] 2 K. B. 11; *Gardner* v. *Cone*, [1928] Ch. 955.

In *Waite* v. *Jennings* (*supra*), Williams and Stirling, L.JJ., were of opinion that there was no infringement of section 144 if the lessor

exacted from the assignee a direct covenant to pay the rent and perform the lessee's covenants; but this was a majority view, Moulton, L.J., being dissentient on this point. The same decision is also of interest in respect of two further points, namely:—

(1) Such a covenant by the assignee when entered into is valid and enforceable, the wrong (if any) being done to the assignor, who should not have been put on terms requiring him to obtain an assignee who would give such a covenant. Obviously there was no such wrong if the requirement did not amount to a fine, as the majority of the Court considered.

(2) If a fine is paid, it cannot be recovered; and see *Andrew* v. *Bridgman*, [1908] 1 K. B. 596.

Landlord and Tenant Act, 1927, s. 19 (1)

Whilst there obviously are cases to which the section above mentioned may still apply, its importance has been very much reduced by the provision contained in section 19 (1) of the Landlord and Tenant Act, 1927, which applies to cases where there is a covenant, condition or agreement preventing assignment, underletting, charging or parting with possession *without licence or consent*. That sub-section adds an automatic proviso (notwithstanding anything to the contrary in the lease) "to the effect that such licence or consent is not to be unreasonably withheld", whilst preserving the landlord's right to payment of legal and other expenses in connection with the licence or consent.

Unreasonable Withholding of Consent

It is clear that in the long run the question whether consent has been unreasonably withheld in any particular case is one which must be decided by the Courts. Nevertheless, certain attempts have been made to provide in tenancy agreements or leases that refusal of consent in certain circumstances shall not be deemed to be unreasonable. Whilst such provisions might be held by the Court to be reasonable in the particular circumstances, they are really of no effect because the Court will uphold them only if it is considered that they are reasonable; and the Court would uphold the refusal of consent in such circumstances without any express provision in the lease or tenancy agreement in question. As to the imposition of conditions restrictive of assignment or underletting, it is not safe to say that such conditions are necessarily nugatory, and that a landlord must either give or withhold his consent, and cannot impose conditions of any kind in consideration of permitting the assignment or underletting in question. It is clear that if there were a covenant

in the lease that the premises should not be used for a particular purpose, such a covenant would normally be effective. If instead of imposing such a covenant the landlord stipulated that an assignment should not be made to a person carrying on a certain trade, namely the trade carried on by the landlord's tenant of adjoining premises, it is by no means clear that the Court would consider that such a condition was invalid. Nevertheless no real advantage would be gained by inserting such a condition except as a warning; for the Court would in such a case uphold the refusal of consent even if no such condition had been inserted.

It may therefore seem strange that at least three cases have come before the Courts where landlords have not merely attempted to lay down conditions concerning the assignment or underletting of premises where the lease contained a covenant not to assign without consent; but have sought to defend those conditions by litigation. Thus in *Balfour* v. *Kensington Gardens Mansions*, [1932] 49 T. L. R. 29, the tenancy agreement provided that upon an underletting the sub-tenant should enter into a direct covenant with the landlord to pay the rent and to perform the covenants of the head lease. It is obvious that in cases of underletting the sub-tenant may be paying a lower rent than that reserved by the head lease. That is particularly evident in relation to a sub-letting of part. Moreover, if the head lease contains any repairing covenant it is unlikely that a sub-tenant taking the premises for a very short term will be willing to accept any repairing liability. The requirement above mentioned was held to be ineffective.

In *Lee* v. *K. Carter, Ltd.*, [1948] 2 All E. R. 690, there was the usual limited covenant in relation to assignment, underletting or parting with possession, and a similar condition to that inserted in the tenancy agreement in the case last mentioned with a further proviso that the use of the demised flat as a residence for a Mrs. Bowman and her family or any director of the lessee company should not be deemed to be a breach of covenant.

It may be said at once that the requirement of a direct covenant was clearly nugatory; but that point did not arise. The main interest of the case lies in the fact that (although it is always for the Court to decide whether consent has been withheld unreasonably) the Court clearly considered that it was proper to examine the terms of the lease in order to discover what was in the contemplation of the parties. Tucker, L.J., in the course of his judgment, said that it was clear from the provisions of the lease that it was expressly designed to ensure for the landlord that, at the expiration of the lease, he should have as tenant, if he was so minded, a limited liability company which would not be able to claim the protection

of the Rent Restrictions Acts. It must not be assumed from that observation that a refusal to permit a lessee company to assign controlled residential premises to an individual would be a reasonable withholding of consent. The point has not been the subject of a judicial decision, and the remark of the learned Lord Justice, if segregated from its context and from the special facts of the case, may be misleading. The essential facts in that case were that the lessee company, towards the conclusion of the term of the lease, proposed to assign it to the very person, namely Mrs. Bowman, who under the lease above mentioned was entitled to reside there during the term of the lease. It was, therefore, clear that the real object of the assignment was to create a protected tenancy in favour of Mrs. Bowman. The Court considered that the lessor's refusal of consent was not unreasonable. The lessons to be learned from that decision are :—

(1) That although it is for the Court to decide whether consent is unreasonably withheld, and the Court cannot be bound by any provisions in the lease which are intended to declare in what circumstances consent can be withheld, those provisions may nevertheless contain terms or reveal facts which the Court will take into account when deciding whether, in any particular case, the lessor's refusal to consent to a dealing is reasonable.

(2) That if the lessor's refusal to consent is to be upheld as being reasonable, it must be based on the personality of the proposed assignee or underlessee, or on the nature of the user to which the premises are likely to be put if the assignment or underletting should proceed.

A casual reading of the decision last discussed might lead to the reflection that where premises within the Rent Acts are let to a company, a lessor may refuse his consent to an assignment to an individual as a matter of right, upon the sole ground that the assignee would become a statutory tenant on the expiry of the tenancy. Such a view is not justified by the judgments delivered in that case. The position was well stated by Evershed, M.R., in *Swanson* v. *Forton*, [1949] 1 All E. R. at p. 141 : " It could not be suggested to be right that a landlord may always reasonably refuse his consent to an assignment (or an underlease) merely because his chances of dominion over his property at the end of the lease might thereby be enhanced, or the chances of a continued right of personal occupation after the end of the term might be thereby diminished, for otherwise a landlord would, in effect, be justified in refusing his consent at any time to any assignment or any underletting ".

In *Swanson* v. *Forton* (*supra*), the lessee, who was under

covenant not to assign without consent, applied to the landlord about a month before the term expired for licence to assign the tenancy to a sub-tenant, and twelve days before the term expired he assigned the tenancy to the sub-tenant without having received the landlord's consent. The question before the Court was whether the consent was unreasonably withheld. There was no doubt that the main object of the assignment was to put the sub-tenant in a position to claim a statutory tenancy at the end of the term, the remaining twelve days of that term being a negligible period. The Court held that the landlord had not unreasonably withheld his consent in those circumstances.

Whilst it is clear enough that the laying down of any hard and fast test of what is a reasonable or unreasonable refusal of consent is impracticable, it may be useful to consider whether any principle can be extracted from the decision last mentioned, and where that principle will lead us. In the *Swanson Case* it is particularly to be noted that in addition to the fact that the term of the tenancy was practically spent, the tenant was not in occupation himself. Lord Greene, M.R., considered that the tenant was attempting to pass on the benefit of a statutory tenancy to a third person, whereas, if he had himself returned to the premises and had remained there after the very short remaining period of the tenancy, and had thus become a statutory tenant he would not have been able to assign the benefit of that tenancy to another person.

Short Tenancies

The solution of one problem often suggests to the mind another problem, and *Swanson's Case* is no exception. If the shortness of the term is the important factor, what is the position in connection with, say, a quarterly or monthly, or even a weekly tenancy? The agreement may provide that consent is not to be unreasonably withheld, either in express terms or by reason of the operation of section 19 (1) of the Landlord and Tenant Act, 1927, when read with a covenant not to assign without the consent of the landlord. If that is the case, can it be said that the right of the tenant to occupy the premises is so short in all those cases, or in some, and if so which of those cases, as to prevent the tenant from availing himself of the right to assign in any circumstances? If the tenant were in occupation it is quite true, as Lord Greene pointed out, that if he remained in possession at the end of the tenancy he would become a statutory tenant and would not be able to assign the benefit of such a tenancy; but, of course, that begs the point, because no one knows when a quarterly, monthly or weekly tenancy will end. The question here is as follows. Is the Court to distinguish between cases in which

a lengthy tenancy is coming to an end, and periodic tenancies for short terms, and if so why? In the case of, say, a quarterly or monthly tenancy of the kind above mentioned, it is submitted that the landlord cannot say, "Because the term is so short I am not prepared to grant my consent to an assignment". When the quarterly or monthly tenancy was granted the landlord could have insisted that he would not let the premises except upon the terms that the tenant should covenant absolutely not to assign (or underlet) the premises or any part thereof. Having in fact let the premises on the footing that consent was not to be unreasonably withheld, it is submitted that it would be impossible for the landlord to withhold his consent upon the ground that the quarterly or monthly tenancy had so short a term to run that the current quarter or month would run out before the references could be taken out and the licence granted, or that he could by a short notice end the contractual tenancy. And the same is obviously true of a letting for a single month or quarter subject to similar conditions as to assignment or underletting. Any other construction would convert the qualified covenant concerning assignment or underletting into an absolute covenant not to assign or underlet.

Personality of Assignee and User

Turning back to *Lee* v. *Carter* (*supra*), it is difficult to appreciate the exact *ratio decidendi*. It would seem that the Court of Appeal considered that it was entitled to base its judgment on the view that there was something connected with the personality of the proposed assignee or the nature of the proposed user which rendered the withholding of consent reasonable. Whilst the proposed assignee was someone who was already in occupation, but who would cease to be entitled to remain in occupation immediately the tenancy had expired, the Court was clearly influenced by the fact that the lessee was a limited company. It is submitted that if the Court intended to lay down the proposition that where a limited company is a tenant it is reasonable to refuse consent to an assignment to an individual, then it would have so stated in *Lee* v. *Carter*. On the other hand, unless that is the result of *Lee* v. *Carter* it is not easy to understand why it was reasonable to refuse consent to an assignment to an individual who was connected with the company, and who was (quite properly and reasonably) in occupation. If, as appears, no excuse could have been found for the refusal of consent if the individual in question had not been in occupation, as an official of the company, it is certainly possible to say that the refusal arose out of the personality of the intended assignee. But when it is noted that the real objection to her "personality" was that she was an

individual, and that as such an individual she would become a statutory tenant upon the expiry of the tenancy, whereas the lessee was a company and would not become so entitled, it is difficult to extract any general principle from the decision.

The remarks of Lord Greene in *Swanson* v. *Forton* (*supra*), suggest that in deciding whether a consent is unreasonably withheld it is proper to consider not only matters which will arise during the currency of the lease, but also the consequences which will ensue after it ends if the licence is granted. It does, however, seem from *Swanson's Case* that in the case of a letting for a fixed term a landlord may " reasonably " withhold his consent to an assignment of the tail end of the lease where the object of the assignment is to confer on the assignee a statutory tenancy under the Rent Acts. It is, however, as difficult to define the " tail end " of a lease as it is to determine how many stones constitute a pile. Moreover, for the reasons above given, the shortness of the term could not, it is submitted, be relevant in the case of a periodic tenancy not the subject of a notice determining it, or a tenancy originally granted for a short fixed term unless, in the latter case, the fixed term had only a negligible period to run.

A Recent Decision

The latest case in which the lessor had attempted to provide a ready-made test of reasonable refusal of consent is *Re Smith's Lease*, [1951] 1 All E. R. 346, where the lessor had hopefully but, it is thought, not very skilfully, added to the usual qualified covenant against assignment, underletting or parting with possession a proviso declaring that any refusal to consent to any assignment or underletting was not to be deemed to be unreasonable by reason only that the lessor might when refusing such consent offer to accept a surrender of the tenancy, the tenant being then given the option of withdrawing the application for consent or surrendering the tenancy. Upon such an application being made the lessor refused his consent, but offered to accept a surrender. The lessee claimed that the lessor's refusal was unreasonable and the Court so held. Roxburgh, J., pointed out that a lessor cannot restrict the ambit of section 19 of the Landlord and Tenant Act, 1927, which applies the sole test of " reasonableness " in relation to the question whether the lessor can validly withhold his consent. His Lordship proceeded with the following words with which this article may suitably be concluded : " The question is objective : Is it reasonable ? That question has to be decided without regard to the interpretation which the parties have put on that expression ".

It is felt that the lessor might have achieved his object by a different wording, and a form has been devised (*post*, p. 552) which will enable a lessor to withhold consent to dealings with the lease if in his absolute discretion he decides to do so. It is thought that in such a case the lessee should normally be permitted to surrender his lease if the lessor exercises his absolute right to withhold consent to an assignment or underlease to a respectable and responsible person, unless the remainder of the term is negligible.

SEPARATION AND MAINTENANCE DEEDS

By Niul Hogg, Barrister-at-Law

The recent decision of Devlin, J., in *Bennett* v. *Bennett*, [1951] 1 All E. R. 1088, will require some alterations in the usual forms of separation and maintenance deeds and it is hoped that the Clause on p. 555 will provide what is needed.

Although it was held by the House of Lords in *Hyman* v. *Hyman*, [1929] A. C. 601, that a covenant by a wife not to apply to the Court for maintenance was unenforceable against her, a covenant of this nature has continued to be inserted in many separation and maintenance deeds. It now appears that this covenant is not only void but also illegal as being contrary to public policy and therefore vitiates the whole deed which contains it.

In *Bennett* v. *Bennett* (*supra*) the facts were as follows :—

> The parties were married in 1926, and on August 10, 1948, the plaintiff presented a petition for the dissolution of the marriage. She asked for the custody of the two sons of the marriage and for alimony pending suit, maintenance of the younger son, and maintenance and a secured provision for herself. The petition was not defended, and on November 24, 1948, the parties, obviously in anticipation of the decree, entered into the deed on which the wife brought her action. The deed recited the nature of the provision which the husband proposed to make, and continued :
>
> " And whereas Mr. Bennett has agreed with Mrs. Bennett to make such provision for her and the younger son as hereinafter appears in consideration of Mrs. Bennett agreeing not to proceed with the prayer contained in her said petition that Mr. Bennett do pay to Mrs. Bennett alimony pending suit maintenance of the younger son maintenance and a secured provision and consenting to such prayer being dismissed and agreeing to enter into such covenant to refrain from presenting any further petition for maintenance or for the education or maintenance of either of the said children and otherwise as hereinafter contained."
>
> Clause 10, on which the case turned, provided as follows in its material parts :
>
> " Mrs. Bennett hereby covenants with Mr. Bennett : (a) To accept the provision hereby made for her and the younger son

in full satisfaction of all rights and claims of Mrs. Bennett and her said two children or any of them against Mr. Bennett in respect of alimony pending suit maintenance of her said two children or either of them maintenance of herself or secured provision for herself or any like relief whether under section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, or section 10 of the Matrimonial Causes Act, 1937, or otherwise howsoever; (b) not to proceed further with the prayer in her said petition that Mr. Bennett do pay to Mrs. Bennett alimony pending suit maintenance of the younger son maintenance and a secured provision and to consent to such prayer being dismissed; (c) not to institute enter present or proceed with nor to procure suggest assist or encourage directly or indirectly either in her own right or on behalf of her said two children or either of them any petition summons or other proceedings for or in respect of any such alimony pending suit maintenance of her said two children or either of them maintenance of herself or secured provision for herself or any like relief."

The wife also agreed to provide out of the annuities or otherwise for the maintenance and education of the younger son during his infancy. On the same day the registrar in chambers ordered that, the respondent having executed a deed making provision for the maintenance of the wife and younger child, the application for maintenance of the petitioner and the younger child contained in the petition be dismissed. The decree nisi was granted on December 6, 1948. The decree absolute followed, and the instalments of both annuities were paid until, the husband said, financial difficulties rendered him unable to keep up the payments.

The case was actually decided on the illegality of the wife's covenant " Not to institute . . . proceedings for . . . maintenance of her said two children or either of them ", which having regard to the language of section 191 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925 (now section 26 (1) of the Matrimonial Causes Act, 1950), would seem clearly to be within the vice against which the decision in *Hyman* v. *Hyman* (*supra*) was aimed. Devlin, J., gave no decision on the question of the legality of the wife's other covenants, " Not to proceed further with the prayer in her said petition that Mr. Bennett do pay to Mrs. Bennett . . . maintenance . . . and to consent to such prayer being dismissed " and " Not to institute proceedings for maintenance of herself . . . or any like relief ".

It was argued for the wife that once the prayer had been dismissed no further proceedings would be maintainable, with or

without her covenant, and that to consent to the dismissal was unobjectionable. In support of these propositions, counsel cited *Mills* v. *Mills*, [1940] P. 124, where the wife sought to re-open the question of maintenance some years after that matter had, by consent, been determined.

The facts in that case, so far as material, were as follows :—

> On May 12, 1932, the wife obtained a decree *nisi* for dissolution of her marriage. That decree was made absolute on November 21, 1932. On December 6, 1932, the wife presented a petition for maintenance. Upon that petition an order was made on December 29, 1932, which was a consent order directing the husband to pay to the wife " during their joint lives and until further order maintenance at the rate of £5 a week free of tax ". In the summer of 1933 the husband's payments fell into arrear : and a judgment summons was taken out for £90 arrears. Before the summons was heard, negotiations took place, with the assistance of the solicitors for the parties, as a result of which the wife agreed to accept a lump sum of £1,250 in satisfaction of all past and future claims for maintenance. That bargain having been come to, a summons was taken out by the wife on October 5, 1933, asking that cause be shown why an order should not be made in the form of the order which was eventually made which was in these terms: " Upon hearing counsel for both parties and by consent I do order that the respondent do pay to the petitioner the sum of £1,250, in satisfaction of all sums now or at any time hereafter payable to the petitioner in respect of maintenance, that the existing consent order for maintenance be discharged, that the maintenance petition be dismissed, that the pending judgment summons against the respondent for arrears of maintenance be dismissed, and that the respondent do pay the petitioner's costs of this application and of the said judgment summons as taxed or agreed ". Subsequently to the making of that order the husband's financial position improved and that was the ground upon which the wife based her application.

The Court dismissed the appeal, holding that in the circumstances the application was not made " on " a decree for divorce within the meaning of section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925 (now section 19 of the Matrimonial Causes Act, 1950). In reaching this decision the Court held that the order of 1933 (as set out above) was perfectly proper and had effectively dismissed the maintenance petition so that there was no longer any jurisdiction to vary the order.

It was suggested (and reference was made in support of the

suggestion to some observations of Lord Atkin in *Hyman* v. *Hyman* (*supra*)) that the law did not allow the wife by any bargain to deprive the Court of the power to vary an order for maintenance, once it had been made. In other words, such an order, which was inherently variable, once made had to remain alive for all time, and no consent by the parties could ever put an end to it; and that any order of the Court purporting to put an end to it would be *ultra vires*. Sir Wilfred Greene, M.R. (as he then was), said that to his mind that proposition was a startling one. He could see no reason, in the language of the statute, or in the policy of the law, why parties in such circumstances, where an order for maintenance of that nature had been obtained, should not be able by agreement to put an end to it and to substitute some other provision which they might have agreed upon. The suggestion that once an order for maintenance had been made it was indestructible seemed to him to be based upon an extravagant construction of the Act of Parliament and an extravagant view of public policy. It was an argument which he could not accept.

If the Court may, by consent, dismiss a petition for maintenance there can presumably be nothing wrong in a covenant by a wife to allow such a petition to be dismissed. Indeed, I think so much follows from Sir Wilfred Greene's language in *Mills* v. *Mills* (*supra*). However, it would appear from the later case of *Fisher* v. *Fisher*, [1942] P. 101, that the *ratio decidendi* of *Mills* v. *Mills* (*supra*), that the application was not made " on " a decree for divorce, must be confined to cases where the facts are substantially similar. In *Fisher* v. *Fisher* (*supra*) a wife, in reliance on certain payments under an order for alimony pending suit which the husband continued to make after the decree was made absolute, did not apply for maintenance until some seven years after the decree was made. Nevertheless, the Court held that in the circumstances the application was made " on " a decree for divorce; and Lord Greene, M.R. (as he had then become), referring to his language in the earlier case emphasised that every case must be decided on its own facts.

It cannot, therefore, be said with any certainty that a covenant to refrain from further proceedings by a wife who has allowed her petition for maintenance to be dismissed is otiose and consequently unobjectionable. *A fortiori* it would seem that such a covenant by a wife who has not yet made an application must be contrary to public policy, and none the less so where it is entered into after the decree has been pronounced.

Although the deed in *Bennett* v. *Bennett* (*supra*) was expressed to be made in consideration of the wife's covenant the result would have been the same if, without the consideration being expressed,

the Court had come to the conclusion that an undertaking by the wife not to apply was in fact the consideration. It was decided as long ago as 1767 in *Collins* v. *Blantern*, 2 Wilson 341, that although a deed needs no consideration yet where it is in fact executed for an illegal consideration, even though that consideration be not expressed, it will be held to be void and of no effect. In *Gaisberg* v. *Storr*, [1950] 1 K. B. 107, where the enforcement of an undertaking, not under seal, by a husband to pay alimony was under consideration, Asquith, L.J., said : " The only consideration which could be deduced by inference from the circumstances would be an undertaking by the wife, in exchange for the husband's undertaking, not to apply to the Court for alimony *pendente lite* or permanent maintenance ". This, I think, shows that the Court might in certain circumstances be prepared to imply an undertaking of this sort as the consideration upon which the deed was executed. It is necessary, therefore, to provide in clear and unambiguous terms that the right of either party to apply to the Court is not in any way fettered.

This, however, is not all that is needed. A wife should not be able to upset one part of a bargain and yet be able to hold the husband to the rest of it. This is clearly brought out by the case of *Tulip* v. *Tulip*, [1951] 2 All E. R. 91, which was argued before *Bennett* v. *Bennett* (*supra*) was decided. This was an appeal by the wife against the dismissal of her application under section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949 (now section 23 of the Matrimonial Causes Act, 1950), for increased maintenance.

The facts, which were not in dispute, were these :—

> The parties were married in June, 1916, and there had been no children of the marriage. In 1931 the husband left his wife, and shortly afterwards he brought a petition praying for the dissolution of the marriage on the grounds of nullity. This petition was dismissed. Thereafter, on June 30, 1932, the parties entered into a deed of separation, the material clauses whereof were as follows :
>
> " 1. The wife may and shall henceforth during the life of the husband live separate and apart from him as if she were unmarried and shall be free from his marital control and neither of them the husband and the wife shall in any way molest or interfere with the other of them or the relations or friends of either nor shall require nor by any proceedings whatever attempt to compel the other of them to return to cohabitation nor shall take any proceedings to obtain a divorce or judicial separation on account of anything already done by the other of them. . . . 3. The husband hereby covenants for himself

that if the wife shall so long perform and observe the stipulations herein on her part contained he during his life will pay to the wife during her life (if he shall so long live) . . . such a sum as after deduction of income tax at the current rate shall amount to and leave the clear net yearly sum of £156. . . . 4. The wife shall out of the provision made for her by these presents and out of her separate estate or otherwise in all respects support and maintain herself and pay and discharge all the debts engagements and liabilities which she may incur or enter into and shall indemnify the husband his heirs executors and administrators therefrom and from all actions proceedings costs damages expenses claims demands and liabilities on account thereof."

There was no clause in the agreement whereby the wife undertook not to take any proceedings in the future for maintenance. It was admitted that the husband had faithfully performed on his part all the provisions of the deed, and, in particular, had paid the agreed sum of £156 with complete regularity from 1932 onwards, and was doing so at the date of the hearing. The financial position of the husband had improved since the date of the deed and the wife's position had worsened. The wife, moreover, had become something of an invalid from spinal arthritis.

The appeal was allowed, the Court holding by a majority that there was jurisdiction to hear the application notwithstanding the deed, which was of evidential value only. In a powerful dissenting judgment, however, Harman, J., pointed out the hardship which might result to the husband from granting the application. He said ([1951] All E. R. 91 at p. 100): "I turn now to the deed itself, which, like most separation deeds, does not consist only of a covenant by the husband to pay maintenance to the wife. She obtains from it other advantages—the right to live apart, freedom from proceedings in respect of previous matrimonial offences, the right to retain her personal chattels, and, on her intestacy, to leave her property to her next of kin. All these advantages she proposes to retain and also the advantage of the covenant for the payment of money, but she asks the Court at the same time to relieve her from the burden of clause 4 of the deed which obliges her, out of the provision made for her, to support and maintain herself. This seems to me to be an impossible position: *qui sentit commodum, sentire debet et onus*. In my judgment, no Court should make an order in favour of a wife in these circumstances without requiring that she should abandon her rights under the deed. I think, however, that the husband is entitled to object to that course where

the deed has been entered into by parties on equal terms and at arm's length, and has always been observed since. Moreover, if the deed be set aside, the wife's right to live apart goes with it, and the husband can in due course sue her for desertion and thus rid himself of his obligation to maintain her. Lastly, clause 4 of the deed contains a covenant by the wife to indemnify the husband against all liability on account of her support and maintenance, and I do not see what answer the wife would have to an action by the husband on this covenant for repayment of any sums which the Court ordered him to pay to her beyond the covenanted sum. This would produce circuity of action, and it seems to me to be a plain indication pointing the same way as the other considerations I have mentioned and resulting in this, that where there is an agreement providing present maintenance which cannot be impeached and which has not been repudiated, it ought to be considered as conclusive evidence that the husband has not failed reasonably to maintain his wife ".

I may add that with all respect to the learned Judge I should have thought the answer to his question about the indemnity clause was that just as a covenant not to sue for maintenance is void so this clause too would be void and for the same reason if its effect was to preclude the wife from obtaining effective maintenance from the husband. I cannot think that it can be illegal for a wife to covenant not to sue for maintenance but unobjectionable for her to covenant to reimburse her husband the sums for maintenance which she is awarded.

It is not, however, advisable to provide simply for the avoidance of the deed on the wife's commencing proceedings, for, as Harman, J., pointed out, there may be provisions in the deed advantageous to the husband which he would desire to keep afoot. It would seem better, therefore, to give him a power of revocation to arise if the wife is in any way successful in her proceedings. It would, of course, be possible to provide that the power of revocation should arise as soon as the proceedings are commenced but the effect of this might be so seriously to discourage a wife from going to the Court for fear of losing all as to be held to be *in terrorem* and void.

For much the same reason and also on grounds of simple justice it should be a condition precedent to the exercise of the power of revocation that the husband was not at the time of the commencement of the proceedings or at the time of the making of the order in breach of any of his covenants. It would be unfair to provide that any breach of his covenants should destroy the power to revoke, for then the power might be lost as the result of, for example, one late payment. But if when the wife makes her application the husband

is in breach of one of his covenants that, as it were, " justifies " the wife's application.

The difference between an application for maintenance for a wife and for a child was considered in *Bennett* v. *Bennett* (*supra*). Not only is there a marked difference between the language of section 19 of the Matrimonial Causes Act, 1950, which gives the Court jurisdiction " on any decree for divorce or nullity of marriage " to make an order for the maintenance of the wife, and section 26 which provides that " the Court may from time to time either before by or after the final decree make such provision as appears just with respect to the custody, maintenance and education of the children of the marriage ", but there is a real moral distinction between the two cases. The child does not by virtue of the divorce cease to be the child of the husband but the wife does cease to be his wife, and even in a case of separation she ceases to be his wife in fact although not, of course, in law. Moreover, while a wife who is under no obligation to live with and look after her husband can as a rule help to support herself, an infant child is usually unable to do so. For these reasons a distinction should be made in the clause between orders for the maintenance or benefit of the child only and those for the maintenance of the wife by providing in the former case that only the covenant by the husband to pay for the child's maintenance can be revoked.

Finally, since it does not seem just that the husband can keep the threat of revocation over the wife's head indefinitely, a time limit for its exercise should be provided.

THE AGRICULTURAL CODE: SOME THOUGHTS ON LAW AND PROCEDURE

By J. F. Mackeson

In this Festival year no foreigner, we presume, will be asked to admire our administrative law. To a set of exhibits produced by our legislature through the first half-century, rivalling in diversity of form and content, but not in artistic or entertainment value, those of the South Bank, were added, in 1947, by the Agriculture Act of that year, the County Agricultural Executive Committees and the Agricultural Land Tribunals.

It is not the intention of this article to examine in any detail the procedure eventually elaborated in fourteen Statutory Instruments by the Minister of Agriculture and Fisheries, but it is proposed to examine shortly from the point of view of a practitioner a typical case in the hope that it may be helpful to others, and to follow this with some general criticisms and suggestions. The two most common cases with which the committees and tribunals have to deal are a landlord's request for the Minister's consent to a notice to quit given to the tenant, and a landlord's request for the granting of a certificate of bad husbandry.

The following is a rough outline of a typical case to date. Shortly before the Agriculture Act, 1947, came into force, X, who inherited a farm from his father, and who has a son aged about twenty-five whom he wishes to start in farming, heard of an adjoining farm for sale which had been since before the war tenanted by farmer Y. X buys the farm by private treaty, although he has had more than a hint that Y is eager to buy. X gives notice to quit to Y who serves the required counter-notice, and the landlord then asks for the Minister's consent. The matter is, of course, dealt with by the county committee as the Minister's agents. The committee duly arranges for an inspection of the holding and notifies the parties that it will hear their case on a fixed date. The parties attend with their valuers and, sometimes, solicitors. The case is one of several to be heard that day and the time-table only allows about half an hour for dealing with each case. The procedure before the committees is known to vary considerably from county to county, depending on the chairman's ruling. The general impression to the legal mind is that of a free-for-all with the rules of evidence unplaced. In our chosen case the landlord is relying on proving both greater hardship,

having bought before August 6, 1947, and also more efficient farming than the tenant. It appears that the tenant has some off-lying land, part owned by him, part in his original tenancy but not bought by X, all entirely without buildings and not suitable for use in a wet winter. The committee duly hear the case and a few weeks later the parties are informed of the Minister's decision, which is, that he gives consent to the notice. The tenant sends in formal notice of appeal within the fourteen days allowed and his valuers instruct solicitors to act on his behalf. The committee serve the parties with copies of the documents in the case, the most important being a statement of their reasons for the Minister's decision. This document, of course, gives some indication to the parties of the case which must be met before the tribunal. At this stage it is necessary for the solicitors to take detailed instructions as to the points of hardship and more efficient farming which will be in issue, and this often means an interview of four or five hours with the tenant and his valuers. It is optional to file on the appellant's behalf a statement of reasons for the appeal, but this is not compulsory, and as time usually presses it is common to omit this.

The secretary of the tribunal then notifies the parties of the date and place of hearing. The usual practice appears to be for a whole day to be allotted to each case. The hearing takes place in some local court house or council chamber within reach of the farm or convenient to the parties. There are eight tribunals, and their practice varies in detail, especially with regard to the right to begin, and the time for inspection of the holding, which is usually made unless the only issue is hardship, when an inspection may well be irrelevant. Inspection takes place either before, during or after the formal hearing. Much as the advocate enjoys being paid to walk round a farm on a fine day, it is apt to have a dulling effect on his later efforts at cross-examination, and he would prefer the tribunal to inspect on its own either before or after, and without a running commentary from either side eager to make some telling point. As regards the right to begin, some tribunals treat the matter as a rehearing and some as partly rehearing and partly appeal. Although the rules allow the tribunal to relax the strict rules of evidence, most of the evidence would be quite acceptable to the strictest judge. The chairman, of course, has to be a barrister-at-law of at least seven years' standing and, therefore, is not likely to relax the rules too much. In our present case the solicitor for the appellant starts and his case is about completed by lunch-time, when the tribunal announces that it will inspect after lunch. Accordingly, after the inspection, the parties return to the court room at about 3.30 p.m.

On the present occasion the case is not completed the same day, but continues for nearly the whole of another day. (Tribunals quite often sit up to 7 or 8 o'clock in order to complete a case.) It comes out in evidence that both landlord and tenant are farming efficiently and also that the tenant, if he has to go, will be quite unable to farm on the forty or so acres of land which he will have left. On the issue of hardship it appears that the tenant is married, has children at school in a local market town, is dependent on agriculture for his livelihood and has been unable to obtain a farm to let or buy at a reasonable rent or price in the district. The landlord pleads that he wants the farm for his son who is getting married, and admits that he has several cottages available on his farm. It also appears from the landlord's own admission that he bought the farm knowing that the tenant was also in the market, and without giving him a sufficient chance to negotiate with the owner. After the advocates on each side have summed up, the tribunal retires to consider its decision and the chairman delivers a careful and reasoned judgment. Some tribunals do not give a " speaking " decision, or, at least, not always, and then the parties are notified by post of the result some days later. In our present case the tribunal allows the appeal, stating that the landlord has not satisfied it on either ground. The tenant returns with a sigh of relief to his farm. However, there is nothing in the Act or Regulations to prevent a landlord from serving an annual notice to quit, and this is what happens here. This time the committee follows the tribunal and refuses consent, and so the landlord appeals to the tribunal. Unfortunately the tribunal is differently constituted, so that there is another full hearing going over to a second day. Again the landlord's appeal is refused; there has, in fact, been no real change in circumstances. Each year the tenant must spend much time and effort looking for another farm in order to meet the issue of hardship. The landlord serves a third notice to quit with the same result.

So far our case to date. It is not common for the same case to come before the tribunal more than once, but it is certainly not a rare matter. To sum up the general impression of the new Acts, there seems to be general agreement that they have been worked fairly by the committees and the tribunals. Some criticisms and suggestions from a legal point of view may be summarised as follows :—

1. The lack of any check on the annual notice to quit. Some check would be the power to award costs which the tribunal has not got at present, but it is submitted that this in itself is inadequate and fails to meet the case of the landlord with sufficient resources not to be worried about payment of costs, especially when he knows that possession will bring a

large increase in the value of the farm. It appears desirable that the tribunal should have the power to award costs, but there should also be a definite ruling that a fresh application can only be made say after three years, unless with leave of the tribunal for material change in circumstances.

2. The committees give insufficient time to the hearings, with the result that they do not sometimes do themselves, let alone the parties, justice, and, therefore, a different picture is developed before the tribunal. It is true that the committees have some background knowledge to start with, which the tribunal naturally lacks, but even so the hearings are too short.

3. It seems clear that the Act envisaged arbitration as the only means of deciding whether a statutory reason given in a notice to quit had been justified or not, *e.g.*, whether the tenant had at the date of the notice to quit failed within a reasonable time to comply with a notice in writing requiring him to remedy breaches of tenancy agreement not inconsistent with the rules of good husbandry. The Act empowers the Minister to make rules requiring such questions to be determined by arbitration, but the Minister has made a rule that may be construed as making it optional for the tenant to ask for arbitration or to put the landlord to proof of his reasons in an action in ejectment at the end of the tenancy, and at least two county court judges have so held. This is unsatisfactory on two grounds; it leaves both parties in uncertainty until the last moment, and the court may well have to consider the matter after expiry of the twelve months' notice to quit, whereas, if the matter goes to arbitration, it will usually come before the arbitrator not long after the service of the notice to quit. It is obviously very difficult for any judge to state whether there has been failure to trim a hedge or clean a ditch at a point in time which is more than twelve months prior to the hearing. The Minister could himself put this right by altering the rules (*a*).

4. There should be an appeal to the High Court or Court of Appeal from the tribunal on a point of law. It is true that this matter was discussed while the Act was being debated in the House of Commons, but even so it still seems desirable that there should be such an appeal. At the moment the only remedy would appear to be certiorari, and that remedy is only open if the tribunal gives a " speaking " decision, and if *R.* v.

(*a*) The Minister might also reconsider his regulations as to sub-tenants which seem to fall short of the promise in section 26 of the 1948 Act.

Northumberland Tribunal (*b*) is good law. (Failing a complete revision of our administrative law it would be an advance if every tribunal in the land from dairies to pensions had to give such a decision.)

5. Ought the farming community to get the services of the committee and the tribunal free? Litigants in the Courts of Justice have to pay court fees.
6. Were not the draftsmen of the Act too subtle in their new definition of agricultural holding, and is not an amendment required in view of the decisions in *Dunn* v. *Fidoe* (*c*) and *Howkins* v. *Jardine* (*d*)?

   There seems no reason in practice why part of the parcels of a lease should not form an agricultural holding and the remainder not. The cases cited dismiss this interpretation, which is thought to have been the intention of the legislature.
7. Ought not the Minister or some court to be given power to extend the various time limits now set by the rules? The forms of action may now be dead but the Agricultural Acts are full of procedure, and it must be remembered that equitable doctrines have very little chance to mitigate statutory procedure.
8. At present there seems to be no consistent reporting of decisions. It is true that most turn on their peculiar facts, but a short summary of the facts and decisions in the more important cases would be helpful, especially to those not often appearing before the tribunals.

(*b*) [1951] 1 All E. R. 268, and *quære* whether a "spoken" decision not afterwards reduced to writing by the tribunal as part of its formal decision is a "speaking" decision. Probably it is not.
(*c*) [1950] W. N. 419.
(*d*) [1951] 1 K. B. 614.

SOME NEW LOCAL LAND CHARGES

By J. F. Garner, LL.M., Town Clerk of Andover

The two last years have seen several additions to the list of charges that are registrable in the local land charges register, and as the conveyancer may on occasion come across one or other of these, it may be useful to explain their effect on the land against which they may be registered.

(a) *Prevention of Damage by Pests Act*, 1949.

Under this Act, which became fully operative on April 1, 1950, the local authority (*i.e.*, the county borough or county district council) may require the owner or occupier of premises within their district to take certain action to prevent or reduce infestation by rats and mice. In default of compliance with any such notice, the authority may act themselves and recover their expenses in so doing from the person in default. When that person is the owner of the premises, the expenses will become a charge on the land in manner provided for by s. 291 of the Public Health Act, 1936, and this charge will be registrable in Part II of the relevant local land charges register.

Incidentally, the question whether or not a notice may have been served in respect of a particular property, would normally be disclosed in answer to the usual inquiries made before contract of the local authority.

(b) *Coast Protection Act*, 1949.

This Act will, of course, affect only a limited number of properties, but it is not confined in effect to land which actually fronts or abuts on the seashore, as coast protection charges may be levied on any property which has benefited, or would benefit as a consequence of a " works scheme " under the Act. There are two main provisions under the Act, first, that enabling a coast protection authority to make a works scheme, providing for the execution by them of coast protection works, partially at the cost of owners of property which would benefit from such a scheme (much in the manner of private street works under the Act of 1892), and, secondly, that enabling the authority in certain circumstances to require a land owner to carry out coast protection work. Either

of these provisions may give rise to local land charges, and if a charge under the Act is revealed on a search, the purchaser should be most diligent in obtaining the fullest possible information on the matter.

Works schemes which do not specify the persons by whom the coast protection charges are to be paid, are registrable in Part I of the local land charges register (see Coast Protection Act, 1949 (Registration of Schemes) Rules, 1950 (SI 1950, No. 1435)), and may be compared with the provisional apportionments of private street works procedure—except that the owner of a particular property cannot be sure that he will be required to pay anything at all towards the cost of the scheme. By virtue of the same Rules, where the scheme specifies the persons by whom the coast protection charges are to be paid—or, it is submitted, where those persons have been subsequently determined—the scheme is registrable in Part II of the register.

Where the local coast protection authority have required the owner of certain land to carry out coast protection work under the provisions of the Act (otherwise than in pursuance of a works scheme), the authority may themselves execute such work in default of compliance therewith, and their expenses thereby incurred are recoverable from the owner, and are registrable as a local land charge (according to the general principles of s. 15 (1) of the Land Charges Act, 1925) in Part II of the register.

By virtue of the Coast Protection Rules (*supra*), works schemes under the Act are put on the same legal basis as if they were actual local land charges, and there is therefore no doubt but that a scheme would not be enforceable against a particular purchaser for value unless it had previously been registered. Owing to the importance of these schemes, however, it is most desirable that purchasers of property in coastal areas should inquire of the local authority—before contract if possible—whether there was any intention to make a scheme that might affect the property in question.

(c) *Public Utilities Street Works Act*, 1950.

We have already dealt with the effect of this statute on the local land charges register in the April issue of this Journal, at p. 78, *ante*.

(d) *Housing Act*, 1949.

The effect of conditions that may be imposed by a local housing authority where an advance has been made under the provisions of Part II of the Housing Act, 1949, for the improvement of existing

privately owned housing accommodation, has been considered in an article published in this Journal for September, 1949 (Vol. 13, at p. 327–8). By the Housing Act, 1949 (Registration of Conditions) Rules, 1951 (SI 1951, No. 185), it has now been provided that these conditions are to be registered in Part IV of the local land charges register, and that they are to be regarded for the purposes of the Local Land Charges Rules, 1934, as if they were local land charges. Failure to register such conditions would therefore impair their enforceability as against a subsequent purchaser for value, but, as pointed out in the article above mentioned, the local authority will still be able to demand re-payment of the amount advanced from the owner of the dwelling for the time being, and recover such sum by proceedings in the local county court (see ss. 23 (2) (*a*) and 24 (4) (*b*)).

(e) *Highways (Provision of Cattle-grids) Act*, 1950.

Under s. 9 of this Act, a landowner may agree with the local highway authority for the use of land for the purpose of the construction of a cattle-grid under the provisions of the Act, in manner similar to a forestry dedication covenant under the Forestry Act, 1947. Any such agreement is registrable as a local land charge, and (under the Highways (Provision of Cattle-Grids) Act, 1950 (Registration of Agreements) Rules, 1951 (SI 1951, No. 813)) should be registered by the appropriate registrar in Part IV of such register. Failure so to register an agreement under the Act will render the agreement unenforceable against a subsequent purchaser for value, and any such purchaser can therefore rely on his search. It may, however, be as well to inquire of the local highway authority in cases of the acquisition of open land in country districts, whether there are any proposals in contemplation for the construction of cattle-grids, for such proposals may well lead to the use of the powers of compulsory acquisition given by s. 8 of the Act.

(f) *Rivers (Prevention of Pollution) Act*, 1951.

Although this statute does not create any new local land charges, it does create a new series of land registers which will be of interest to conveyancers, and in which in relevant cases (*i.e.*, where the property abuts on a "stream", as defined by s. 11 (1) of the Act), it is suggested a search should be made, before contract if possible. Under s. 7 (7), every river board (constituted under the River Boards Act, 1948) is required to maintain a register containing "such particulars as the Minister may direct" (no directions

have yet been issued), of conditions which have been imposed in relation to the bringing into use of new or altered outlets to the stream, or in relation to the discharge of effluent from land or premises into the stream, in so far as the said conditions remain enforceable. This register is to be open to inspection at all reasonable hours, by any person " appearing to the river board " to be interested in the outlet, or in the land or premises, and is to be conclusive as to the conditions in favour of any person charged with the offence of causing or knowingly permitting to enter a stream an effluent not complying with such conditions.

The substantial effect of s. 7 of the Act is to prohibit the making of new or altered outlets into a stream, or the making of a " new discharge " (as defined in sub-s. (8)) of trade or sewage effluent into a stream. The purchaser of trade premises abutting on a stream, and requiring an outlet for trade effluent will therefore be particularly affected by the restrictions of this section, and the appropriate register should be consulted in such cases.

General Observations.

The report of the Lord Chancellor's Departmental Committee on local land charges, appointed as long ago as February, 1949, has still not been issued, although the local authority associations and learned bodies (such as the Law Society) submitted memoranda many months ago. Some of the matters requiring urgent attention were considered in an article published in the issue of this Journal for December, 1949 (Vol. 13, at p. 453), and the recent developments noted above have made the law on this subject of even greater practical importance and complexity.

THE PUBLIC ELEMENT IN CHARITABLE TRUSTS

By Spencer G. Maurice, *Barrister-at-Law*

In *Jones* v. *Williams* (1767), 2 Amb. 651, Lord Camden, L.C., defined charity as " a gift to a general public use ", while in *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501, 504, Chitty, J., said : " To be a charity there must be some public purpose—something tending to the benefit of the community ". But although the need for public benefit has long been recognised as a necessary attribute of a charitable trust, what amounts to a public benefit is not always easily decided. That anomalies exist and that the law of charitable trusts is on an unsatisfactory footing is apparent from four recent cases, three of which reached the Court of Appeal and one of which went to the House of Lords. The cases concerned are *Gibson and Another* v. *South American Stores, Ltd. (Gath and Chaves) and Others*, [1950] Ch. 177, *Oppenheim* v. *Tobacco Securities Trust Co., Ltd. and Others*, [1951] A. C. 297, *Re Coulthurst's Will Trusts, Coutts & Co.* v. *Coulthurst and Another*, [1951] Ch. 661, and *Re Scarisbrick's Will Trusts, Cockshott* v. *Public Trustee and Others*, [1951] Ch. 622.

Exceptional Position of Trusts for Relief of Poverty

To the general rule that a gift for the benefit of specific individuals—such as a class defined by reference to a personal relationship to the settlor or testator—is not charitable, there has long existed an exception in the so-called " poor relations " cases, beginning with *Isaac* v. *De Friez* (1754), 2 Amb. 595. Another line of cases where the trusts were held to be charitable, although lacking the public element, is represented by *Spiller* v. *Maude* (1886), 32 Ch. D. 158, note, where the class intended to be benefited were the members of a theatrical society, *Re Buck, Bruty* v. *Mackey*, [1896] 2 Ch. 727, where the beneficiaries under the trust were the members of a friendly society and their dependants, and *Re Gosling, Gosling* v. *Smith*, [1900] W. R. 300, where the class benefited were " old and worn out clerks " of a banking firm.

These last three cases, it is to be observed, all fall, like the " poor relations " cases, under the heading of trusts for the relief of poverty. It was at one time suggested that the element of public

benefit was unnecessary to render a trust charitable, not only in the case of charities for the relief of poverty, but also in the case of those for the advancement of education and the advancement of religion; that it was required only in the case of trusts for " other purposes beneficial to the community ", that is, those within the fourth class in Lord Macnaghten's division of charities in *Income Tax Special Purposes Commissioners* v. *Pemsel*, [1891] A. C. 531. This proposition was, however, rejected by Lord Simonds when he said in *Gilmour* v. *Coats*, [1949] A. C. 426, 446 : " Today it is beyond doubt that that element must be present ". In that case the House of Lords held that the prayers of an order of cloistered nuns were too speculative and intangible for it to be possible to say that the order benefited the community. In *Oppenheim* v. *Tobacco Trust, Ltd.*, where the House of Lords was concerned with an educational trust, Lord Simonds left no doubt that any such proposition rested on a false belief, except in the anomalous poverty cases.

It was long considered that the only trusts for the benefit of poor relations which could be upheld as charitable were those exceeding the limit allowed by the rules of remoteness. It is stated in the 5th edition of *Tudor on Charities* (at p. 26), that : " Trusts for the benefit of poor relations, kinsmen, or descendants exceeding the limit allowed by the rules of remoteness, are upheld as charities ". But it is to be observed that on p. 27 the learned authors, having referred to the fact that there were conflicting decisions as regards gifts intended for immediate distribution, state that : " The sounder view is thought to be that a gift for immediate distribution among poor relations, kindred, and so forth, is charitable except in cases where the intention of the donor, derived from construction of the documents, is to confine the benefit of the gift to statutory next-of-kin. Outside this limit no line can be drawn, and objects ought not therefore to be treated as less extensive where the gift is for immediate distribution than where a perpetual trust is intended ".

In *Att.-Gen.* v. *Price* (1810), 17 Ves. 371, Sir William Grant, M.R., drew a distinction between trusts to have perpetual continuance in favour of a particular description of poor and immediate bequests for distribution among poor relations. When *Re Scarisbrick's Will Trusts* came before Roxburgh, J., in the Chancery Division ([1950] Ch. 226) that learned Judge applied *Att.-Gen.* v. *Price*, and held that a bequest by a testatrix upon trust for such relatives of her son and daughters as in the opinion of the son and daughters should be " in needy circumstances " was not charitable because it seemed to him " . . . Impossible to hold that in all cases

of gifts for immediate distribution among poor relations the relief of poverty has some special quality which provides the necessary public character. It could not, for instance, convert a trust for the testator's children in needy circumstances into a public trust. Accordingly a line must be drawn somewhere" ([1950] Ch. 234). The Court of Appeal, however, has now reversed Roxburgh, J.'s decision, and in explaining *Att.-Gen.* v. *Price*, and holding the trusts in *Re Scarisbrick's Will Trusts* charitable, has admitted within the orbit of charitable trusts "poor relations" cases where the gift is for distribution within the period allowed by the rule against perpetuities.

Counsel for the heir-at-law in *Re Scarisbrick's Will Trusts* argued against the trusts being a valid charitable bequest on the ground that, the *Isaac* v. *De Friez* line of cases being an anomalous exception to the general rule that a public interest or characteristic is necessary to support a valid charitable gift, a case lacking the public element and not by its facts necessarily covered by that line of cases was to be dealt with in accordance with the general rule; he contended that the scope of the *Isaac* v. *De Friez* cases could not be extended so as to include "poor relations" cases contemplating a distribution once and for all within the perpetuity period. Rejecting this argument, Sir Raymond Evershed, M.R., demonstrated how artificial any such rule would be, and pointed out that in no case of a charitable disposition valid because of its public characteristic was there any warrant for distinguishing between trusts maintained in perpetuity, or for some long or short period of time, and trusts for immediate or final distribution. He referred to *Att.-Gen* v. *Comber* (1824), 2 Sim. & St. 93, where a trust construed as being for the benefit of the poor widows and orphans of Lindfield was held charitable, although the fund was so small that a single and final distribution had to be made. The Master of the Rolls continued ([1951] Ch. 639, 640): "The 'poor relations' cases may be justified on the basis that the relief of poverty is of so altruistic a character that the public element may necessarily be inferred thereby; or they may be accepted as a hallowed, if illogical, exception. In any case the exception is in favour of trusts for 'poor relations' and not of trusts of a particular type for poor relations. If the latter were the true view, then only those cases would be treated as exceptions to the general rule which, on their facts, were in substance identical with the poor relations cases in the books. Such a conclusion would lead inevitably to fine and irrational distinctions. The exception, in my view, is of 'poor relations' cases generally, that is, of cases in which relief of poverty is to be exercised within a class of persons

identified by reference to relationship with particular individuals, and not within a class constituting, in strictness, a section of the community. If poor relations cases are to be qualified in the way suggested, then there will be introduced with poor relations cases a further anomaly, a distinction wholly foreign to all other kinds of charitable dispositions".

The Master of the Rolls proceeded to demonstrate how the words in which Sir William Grant, M.R., referred in *Att.-Gen.* v. *Price* to trusts to have a perpetual continuance and trusts for immediate distribution had been, as it were, taken out of their context, so that a wrong interpretation had come to be placed upon them. The subject-matter of *Att.-Gen.* v. *Price* was a devise by will (after a limited interest to the testator's wife) to E. J. and his heirs with a direction that they should ". . . for ever divide and distribute according to his and their discretion amongst my poor kinsmen and kinswomen and amongst their offspring and issue . . . the sum of £20 by the year . . .". Three poor relations of the testator sought to have effect given to this devise, but the defendants submitted that it was void for uncertainty. The plaintiffs relied on *White* v. *White* (1802), 7 Ves. 423, where a trust for putting out poor relations as apprentices was held good. In that case capital as well as income was to be used for the benefit of those found ready for apprenticeship, and though in fact the trust would—as the form of order showed—be maintained for an appreciable period of time, counsel for the defendants in *Att.-Gen.* v. *Price* treated the trust in *White* v. *White* as one for immediate distribution in favour of persons answering the description of poor relations, and sought to distinguish *Att.-Gen.* v. *Price* because the trusts there were to have perpetual continuance. Sir William Grant, M.R., considered that the case before him was of the same type as *Isaac* v. *De Friez*, and that on that account he was entitled to hold the devise charitable; hence his words: "This seems to be just as much in the nature of a charitable bequest as that [*Isaac* v. *De Friez*]. It is to have perpetual continuance, in favour of a particular description of poor; and is not like an immediate bequest of a sum to be distributed among poor relations". The whole point of the argument of counsel for the defendants in *Att.-Gen.* v. *Price* was that the devise was *not* valid because it *was* to have perpetual continuance. There was no need for Sir William Grant, M.R., in holding that it was valid, to express an opinion that a trust which was not to have perpetual continuance was invalid, and, indeed, as Sir Raymond Evershed, M.R., pointed out in *Re Scarisbrick's Will Trusts*, "Such an opinion would have been in flat contradiction to and would have made nonsense of

the arguments submitted to him. . . . If Sir William Grant, M.R., had meant what in some later cases he seems to have been thought to have meant, he would, on the face of the arguments, have been disapproving *White* v. *White*, and it is to my mind inconceivable that he would not either have said so in terms or otherwise have explained its effect" ([1951] Ch. 642, 643).

That the words of Sir William Grant, M.R., have long been misunderstood is apparent from three other cases which were relied upon by counsel for the heir-at-law in *Re Scarisbrick's Will Trusts*. It is true that in the first of those cases, *Liley* v. *Hey* (1842), 1 Hare 580, *Att.-Gen.* v. *Price* was not cited, but it was apparently followed, since Sir James Wigram, V.-C., held that a discretionary trust to distribute income among twenty-four named persons conferred beneficial interests for their lives on all the twenty-four (the discretion not having then been exercised), and was therefore not charitable. The failure to refer expressly to *Att.-Gen.* v. *Price* in that case was commented upon in *Gillam* v. *Taylor* (1873), L. R. 16 Eq. 581, where Sir John Wickens, V.-C., held that a trust in favour of lineal descendants "as they may severally need" was of a permanent character, and therefore charitable.

In *Thomas* v. *Howell* (1874), L. R. 18 Eq. 198, a bequest "to each of ten poor clergymen of the Church of England . . . to be selected by my friend, Joseph Butterworth Owen . . . £200" was construed by Sir Richard Malins, V.-C., as conferring immediate gifts on the persons to be selected, and therefore not to be charitable. There was, in other words, a special power of appointment among a class which, on being exercised, had the effect that the names of the appointees were read into the will as legatees, but which, if not exercised, would have failed altogether of effect. Counsel for the heir-at-law in *Re Scarisbrick's Will Trusts* submitted that the position was similar in that case, and that the special power, not having in that case been exercised, was ineffective. Sir Raymond Evershed, M.R., rejected that argument, pointing out that the cases on which counsel for the heir-at-law relied were not authorities binding the Court of Appeal. In *Re Compton, Powell* v. *Compton*, [1945] Ch. 123, Lord Greene, M.R., had referred to *Att.-Gen.* v. *Price* in terms which led Roxburgh, J., in *Re Scarisbrick's Will Trusts*, to believe that that learned Master of the Rolls was affirming the supposed distinction made by Sir William Grant, M.R. Sir Raymond Evershed, M.R., did not, however, so understand the judgment of Lord Greene, M.R., since the alleged distinction was not relevant in *Re Compton*, and not, in his judgment, present to the minds of the Court. Finding no authority binding the Court of Appeal one way or the other, Sir

Raymond Evershed, M.R., chose to decide the case before him on grounds of principle, coherence and common sense, and accordingly held the testatrix' gift to be charitable.

If, then, the element of perpetuity is not required in order to render charitable a gift for poor relations, is every gift to a relation who is in fact poor charitable as being for the relief of poverty? Clearly, no; as Roxburgh, J., had pointed out in *Re Scarisbrick's Will Trusts*, a line must be drawn somewhere. But, as Jenkins, L.J., appreciated when that case was in the Court of Appeal, it is difficult to draw any exact line. The test, as Jenkins, L.J., in his judgment suggests, appears to be the extent of the class of relations to be benefited; more specifically, it seems that a gift to relatives confined within the category of statutory next-of-kin will not be charitable, while a gift to relations in the full sense—meaning everyone able to claim a common ancestor with the person in question—will be charitable. This is in accordance with the view of the editors of *Tudor on Charities* referred to above. Jenkins, L.J., had no difficulty in deciding that in the case before him "relations" had been used in the latter sense, so that the gift was charitable. ". . . The class of potential beneficiaries, so far from being confined to a limited number of individuals whom the testatrix might be taken to have regarded as having some personal claim on her bounty, at all events to the extent necessary to relieve them from want, is so extensive as to be incapable of being exhaustively ascertained, and includes persons whom the testatrix may never have seen or heard of, and persons not even in existence at the time of her death". (At pp. 651, 652.)

His Lordship then proceeded to point out that some of the "poor relations" gifts were on their true construction gifts to the poorest of the class or to the class with a preference for the poorest, so that they did not satisfy the observation of Sir George Jessel, M.R., in *Att.-Gen.* v. *Duke of Northumberland* (1877), 7 Ch. D. 745, 749, that, "A gift which is not a gift to the poor, that is, the actually poor, is not a charity". The present case did not offend in that way because ". . . no part of the property is appropriated to the exclusive purpose of appointment amongst the relations in needy circumstances. A person shown to be a relation and to be in needy circumstances would have become eligible as an object of the power, but neither any one relation individually nor even all the relations collectively (on the impossible supposition that they could be exhaustively ascertained) would have been entitled to claim that some part of the property must in any event come to him, or to them or some of them, inasmuch as the whole

of the property could have been appointed to charitable objects *eo nomine* ". (At p. 652.)

Explaining the dictum of Sir William Grant, M.R., in *Att.-Gen.* v. *Price*, Jenkins, L.J., did not consider that that learned Master of the Rolls was drawing a distinction between trusts in perpetuity and trusts for immediate distribution, holding that that dictum was " . . . fully satisfied if taken as meaning that an immediate bequest of a sum to be distributed among poor relations may on its true construction be no more than a gift to particular individuals (*i.e.*, the next-of-kin of the *propositus*), whereas a gift having perpetual continuance cannot be so confined. If a gift or trust on its true construction does extend to those in need amongst relations in every degree, even though it provides for immediate distribution, then, inasmuch as the class of potential beneficiaries becomes so wide as to be incapable of exhaustive ascertainment, the impersonal quality, if I may so describe it, supplied in continuing gifts by the element of perpetuity, is equally present ". (At p. 655.)

It has been said above that a gift for the benefit of specific individuals defined by reference to a personal relationship to the settlor or testator is not—subject to the exception created by the " poor relations " cases—charitable. That " personal relationship " means more than relationship by blood or marriage and includes membership of a firm or company was decided by Eve, J., in *Re Drummond, Ashworth* v. *Drummond*, [1914] 2 Ch. 90, where a trust for the purpose of providing holidays for the employees of a commercial company was held not to be charitable as lacking the necessary public element. Eve, J.'s decision was expressly approved by the Court of Appeal in *Re Compton*, where a trust for the education of the descendants of three named persons was held not to be a valid charitable trust. In *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund*, [1946] Ch. 194, *Re Compton* was applied and *Re Drummond* was approved by the Court of Appeal, which held that a fund used to relieve employees of a company who had suffered damage and distress from air raids was not charitable.

There was just as much a personal relationship in the earlier cases of *Spiller* v. *Maude*, *Re Buck*, and *Re Gosling*, although, as pointed out above, the relief of poverty was the object of the trusts in each of those three cases. When, therefore, *Gibson* v. *South American Stores* came before Harman, J., in the Chancery Division, the learned Judge was faced with the *Re Drummond* line of cases on the one hand and the poverty cases—the " poor relations " cases and the *Spiller* v. *Maude* line of cases—on the other. The trust in

Gibson v. *South American Stores* was for the benefit of necessitous employees and their dependants, and Harman, J., held it charitable. The learned Judge expressed the view that " . . . a public object is always necessary to make a trust legally charitable, and that the explanation of the poverty cases is that a much narrower object may in them be considered to work a public benefit than in the other categories " ([1949] Ch. 572, 579).

Benevolent Funds for Employees and their Dependants

When *Gibson* v. *South American Stores* came before the Court of Appeal Sir Raymond Evershed, M.R., said that he was not to be taken to accept Harman, J.'s view, and that it might be that the poverty cases must simply be regarded as a well-established anomaly. The Master of the Rolls referred in his judgment to *Re Sir Robert Laidlaw's Will Trusts* (1935), where the Court of Appeal had held charitable a trust to provide for poor employees of a particular business. This case is unreported, and was not put to Harman, J. The facts were very similar to those in *Gibson* v. *South American Stores*, but it does not appear on what precise grounds the earlier case was decided. It is for that reason unfortunate that the Court of Appeal, in affirming Harman, J.'s judgment in the later case, did not do so on the grounds on which the Judge at first instance had based his decision, but because it considered itself bound to follow *Re Sir Robert Laidlaw's Will Trusts*.

In *Re Coulthurst's Will Trusts* the class selected as the recipients of the testator's bounty was, as in *Gibson* v. *South American Stores*, chosen by reference to employment in a particular business, in this case a bank. The testator by his will created a fund to be called the Coulthurst fund and provided that : " At the expiration of every six months calculated from the date of my death the bank shall pay or apply the income earned by the Coulthurst fund during such period of six months to or for the benefit of such one or more exclusively of the others or other of the widows and orphaned children of deceased officers and deceased ex-officers [of the bank] living at the expiration of such half-yearly period as the bank shall in its absolute discretion consider by reason of his her or their financial circumstances to be most deserving of such assistance ". " Deceased officer " or " deceased ex-officer " was defined to mean any officer (other than a director or auditor) or clerk who was or had before his retirement been in the service of the bank at a salary calculated on a monthly or longer periodic basis, and an orphaned child was defined as meaning the child of any such deceased officer

or deceased ex-officer who was under the age of seventeen years and had lost both mother and father. For the residuary legatee it was contended that the trusts were not charitable, and that they were therefore void for perpetuity. Vaisey, J., in the Chancery Division ([1951] Ch. 193), held that the gift was valid, and the residuary legatee appealed to the Court of Appeal, which unanimously affirmed Vaisey, J.'s decision.

Although the *ratio decidendi* of the poverty cases still remained far from clear after the Court of Appeal's decision in *Gibson* v. *South American Stores*, it was obvious that that case must govern the decision in *Re Coulthurst's Will Trusts*, if the trusts in that case were also for the relief of poverty. The testator in *Re Coulthurst's Will Trusts* did not, however, use the word " poverty " so that the Court of Appeal had to consider whether, having regard to the whole context as well as to the precise language used by the testator in the clause in question, the relief of poverty was intended.

The words " widows " and " orphans " always tend to conjure up a picture of want and distress. Reference has already been made to *Att.-Gen.* v. *Comber*, where there was a gift to " the widows and orphans of the parish of Lindfield ", and it has been said that that gift was construed as being for *poor* widows and orphans. In *Thompson* v. *Corby* (1860), 27 Beav. 649, a gift of a legacy to be divided " between twenty aged widows and spinsters of the parish of Peterborough " was held to be charitable. So Stirling, J., to whom those two cases had been referred, said in *Re Dudgeon* (1896), 74 L. T. 613—where he held to be charitable a bequest for " respectable single women of good character and above the age of sixty years "—" . . . It appears to me that the cases cited on behalf of the charity do show this, that it is not absolutely necessary to find poverty expressed in so many words, but that the Court will look at the whole gift, and, if it comes to the conclusion that the relief of poverty was meant, will give effect to it although the word ' poverty ' is not to be found in it. I do not see how otherwise the decisions of Sir John Leach in *Att.-Gen.* v. *Comber*, and of Lord Romilly in *Thompson* v. *Corby* can be explained ". Furthermore, the meaning of " poor " is more or less relative, and " poverty " does not necessarily mean destitution, as was pointed out by Romer, J., in *Re Clarke*, *Bracey* v. *Royal National Lifeboat Institution*, [1923] 2 Ch. 407.

When Vaisey, J., considered the language of the testator in *Re Coulthurst's Will Trusts*, he said ([1951] Ch. 197): " . . . I rely on the fact that the will is dealing with widows and orphaned children, classes which may, and, in my view, must, include, if the class is sufficiently wide, many proper objects of charity in the legal

sense. Even today the status of 'widows and orphaned children' suggests the possibility, or, perhaps, even the probability, of impecuniosity". Moreover, in the Court of Appeal Sir Raymond Evershed, M.R., said: ". . . Poverty does not mean destitution; it is a word of wide and somewhat indefinite import; it may not unfairly be paraphrased for present purposes as meaning persons who have to 'go short' in the ordinary acceptation of that term, due regard being had to their status in life, and so forth" ([1951] Ch. 666). Indeed, the Master of the Rolls took the view that had the testator provided merely that the objects of his bounty were to be the widows and orphaned children of deceased officers and ex-officers, there would have been good grounds for arguing that the gift was charitable. The testator had, however, added the qualification that the persons to benefit were to be chosen by the bank as being "by reason of his her or their financial circumstances . . . most deserving of . . . assistance". The Master of the Rolls said that to him those words seemed ". . . to mean essentially that the persons selected are persons whose financial circumstances are such that they are not only deserving of assistance, that is to say, wanting help, but, of all such, are those who most want it" (at p. 667), and he rejected the argument that "most deserving" meant "least undeserving". The Master of the Rolls also rejected the argument for the residuary legatee that the provision for a six-monthly distribution meant that money was to be distributed every six months, even though there should be nobody at the relevant time who could properly be described as poor. The provision for a six-monthly distribution was, said the Master of the Rolls, merely an administrative one, and the people to take must plainly be persons then living and persons at the time satisfying the qualification; the reference to six-monthly distribution was inserted to simplify the ascertainment of the persons to take by having every six months a study of those who might be selected for benefit.

Though the requirement of a public element in trusts for the relief of poverty is so far modified as to admit within the category of charitable trusts those for poor relations and those for the relief of poverty amongst members of a firm or company, *Oppenheim* v. *Tobacco Trust, Ltd.*, demonstrates that the same latitude is not permissible where the object of the settlor's or testator's bounty is the advancement of education.

Education of Employees' and Ex-Employees' Children

Like *Gibson* v. *South American Stores*, which preceded it, and *Re Coulthurst's Will Trusts*, which followed it, *Oppenheim* v. *Tobacco Trust, Ltd.*, involved a trust for the benefit of employees

of a company and their dependants. It might, therefore, have been hoped that the House of Lords would be in a position to clarify the authorities which, as has been seen, were still unsatisfactory after the Court of Appeal's decision in *Gibson* v. *South American Stores*. Any such hope has been disappointed. In *Re Coulthurst's Will Trusts* the Court of Appeal merely followed *Gibson* v. *South American Stores*, and did not even refer to *Oppenheim* v. *Tobacco Trust, Ltd.* The cogent dissenting judgment of Lord MacDermott in that case has made it clear, however, how necessary is statutory reform of the law of charitable trusts.

The facts of *Oppenheim* v. *Tobacco Trust, Ltd.*, were as follows. A husband and wife executed a settlement of which the respondent company were the trustees, and thereby assigned to them certain investments and other property to be held on certain trusts during the lives of the grantors and the survivor of them and thereafter on trust to apply the income of the trust premises "in providing for or assisting in providing for the education of children of employees or former employees of British-American Tobacco Co., Ltd., . . . or any of its subsidiary or allied companies in such manner and according to such schemes or rules or regulations as the acting trustees shall in their absolute discretion from time to time think fit and also at the discretion from time to time of the acting trustees to apply all or any part of the corpus of the said trust for the like purposes". The wife died in 1940 and the husband in 1947. Since the trust clearly created a perpetuity it could be valid only if it could be supported as a charitable trust.

Lord Simonds referred to the difficulty of determining what sufficed to satisfy the test of public benefit. His Lordship expressed his full agreement with the decision of the Court of Appeal in *Re Compton*, where Lord Greene, M.R., by way of illustration placed on the same footing members of a family and employees of a particular employer, "finding", as Lord Simonds said ([1951] A. C. 307), "neither in common kinship nor in common employment the sort of *nexus* which is sufficient". Lord Simonds also approved *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund.*

Lord Normand referred ([1951] A. C. 309) to the fact that it was ". . . on the difficulty of defining the attribute or qualification which differentiates a section of the public from an aggregate of persons which is not a section of the public that all attempts to define the public element in charitable trusts have foundered". He conceded, moreover, that a distinction between the present trust and one for the education of the children of all employees in the tobacco industry might appear to be over-refined and

unpractical, " . . . but, unless it is accepted that all trusts for education are charitable, that is a criticism which cannot be avoided " ([1951] A. C. 311). Like Lord Simonds, he followed *Re Compton* and *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund*, and was in favour of dismissing the appeal on the ground that " . . . to admit the present trust to the category of charity would be an innovation contrary alike to principle and to the trend of authority . . . " ([1951] A. C. 312). Lord Oaksey agreed with Lord Simonds' opinion, and Lord Morton of Henryton in his speech likewise concurred.

Lord MacDermott, in his dissenting judgment, referred to the method of approach to the type of issue involved which, he said, had till comparatively recently been usual, namely, to regard the facts of each case and to treat the matter very much as one of degree. In *Oppenheim* v. *Tobacco Trust, Ltd.*, the employees concerned numbered over 110,000, and his Lordship was of the opinion that, following that method, the large size of the class to be benefited could not be left out of account. The noble and learned Lord did not question the correctness of Eve, J.'s decision in *Re Drummond*, but he found no difficulty in distinguishing that case from the one before him. He pointed out that the trust purpose in *Re Drummond* (unlike the trust which he was considering) was not, *prima facie*, within any of the well-known classes of legal charity, and he referred to Eve, J.'s later decision in *Re Rayner, Cloutman* v. *Regnart* (1920), 122 L. T. 577. In that case that learned Judge decided that a trust for the education of the children of employees was charitable, but his decision was expressly disapproved by the Court of Appeal in *Re Compton.* It is easy to be of the same mind as was Lord MacDermott when he admitted that he did not see why in principle a distinction should be drawn between a trust for the relief of poverty and one for the advancement of education.

Trusts for Members of a Particular Company

In *Re Compton*, Lord Greene, M.R., propounded a test which is in effect this : Is the quality which unites beneficiaries under a trust essentially impersonal or essentially personal ? If impersonal, the trust will be charitable, if personal, not. In *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund*, Lord Greene, M.R., referred to *Hall* v. *Derby Sanitary Authority* (1885), 16 Q. B. D. 163, where there was a trust for railway servants, and said ([1946] 1 All E. R. 509) : " It was said that if a trust for railway servants could be a good charity, why should not a trust

for railway servants in the employment of a particular railway company be a good charity? The reason, I think, is that in the one case it would be for railway servants in general and in the other case it would be for employees of a particular company, a fact which would limit the potential beneficiaries to a class ascertained on a purely personal basis". Criticising what he called "the *Compton* test" and referring to the judgment of Lord Greene, M.R., in *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund*, and his reference therein to *Hall* v. *Derby Sanitary Authority*, Lord MacDermott said ([1951] A. C. 317, 318): ". . . If the bond between those employed by a particular railway is purely personal, why should the bond between those who are employed as railwaymen be so essentially different? Is a distinction to be drawn in this respect between those who are employed in a particular industry before it is nationalised and those who are employed therein after that process has been completed and one employer has taken the place of many? Are miners in the service of the National Coal Board now in one category and miners at a particular pit or of a particular district in another? Is the relationship between those in the service of the Crown to be distinguished from that obtaining between those in the service of some other employer? Or, if not, are the children of, say, soldiers or civil servants to be regarded as not constituting a sufficient section of the public to make a trust for their education charitable?"

There is a further point of difficulty—one which Lord Normand evidently had in mind when he conceded that a distinction between the trust in *Oppenheim* v. *Tobacco Trust, Ltd.*, and one for the education of the children of all employees in the tobacco industry might appear to be over-refined and unpractical. It is frequently the case that a particular industry—let us take as an example the tobacco trade—in a particular town is in the hands of a single firm. The result is that although, as decided by *Oppenheim* v. *Tobacco Trust, Ltd.*, a trust for the education of the children of employees of that firm will not be charitable, a trust "for the education of the children of persons engaged in the tobacco trade in the City of X" will be, because the test of public benefit is satisfied by the geographical basis of the trust; but exactly the same children will benefit. In other words, whether or not a trust is effective as satisfying the test of public benefit turns largely on the form of words used by the settlor or testator.

With respect it is submitted that Lord MacDermott's reference to the position of persons in nationalised industries and the service of the Crown gives rise to great doubt as to the validity of the *Compton* test: at the very least it points to the utterly factitious

basis on which the law of charitable trusts rests. Whichever way one regards the matter, one is faced with illogicality. If employment by a designated private employer is to be regarded as a personal bond of union, then, equally, that bond should be personal when the employer is the Crown, or a public corporation such as the National Coal Board. If, on the other hand, the position of the Crown or a public corporation is to be taken as exceptional, so that the bond uniting servants of the Crown or of a public corporation is impersonal, then a bond may, by the process of nationalisation, be changed in a moment from a personal to an impersonal one. Furthermore, Lord MacDermott recognised that the strict application of the *Compton* test might cast doubt on the charitable nature of trusts and institutions long recognised as charities. His Lordship instanced the case of a trust for the provision of university education for boys coming from a particular school. He said ([1951] A. C. 319): "The common quality binding the members of that class seems to reside in the fact that their parents or guardians all contracted for their schooling with the same establishment or body. That the school in such a case may itself be a charitable foundation seems altogether beside the point and quite insufficient to hold the '*Compton* test' at bay if it is well founded in law". The logic of his Lordship's reasoning does not require to be stressed.

Religious and Miscellaneous Charities

To complete the picture brief reference must be made to trusts for the advancement of religion, and trusts for purposes falling only within the last of Lord Macnaghten's four divisions. Although in these fields of charity there have been no very recent decisions which are in point, it seems clear that the position there is the same as in the case of trusts for the advancement of education.

As regards religion it is not necessary to go back further than *Gilmour* v. *Coats* to illustrate the point at issue. In that case the income of the trust fund was to be applied for the purposes of a Carmelite priory which consisted of a community of cloistered nuns, who devoted their lives to prayer, contemplation, penance and self-sanctification within the convent and engaged in no external works. The House of Lords held that the trust was not charitable, the necessary element of public benefit being absent: the benefit of intercessory prayer to the public was not susceptible of legal proof, while the element of edification by example was too vague and intangible to satisfy the test of public benefit. But a gift for the promotion of the Roman Catholic faith is charitable: see, for example, *West* v. *Shuttleworth* (1835), 2 Myl. & K. 684. If, therefore, the gift had been made to the prioress of the priory on trust

to apply it for the promotion of the Roman Catholic faith, the requirement of public benefit would have been satisfied; and it would have been open to the prioress to apply the gift solely for the purposes of the priory.

Turning to the fourth division of charitable trusts, the same anomalies can be pursued into the realm of trusts for the encouragement of sport, to take but one example. In *Re Nottage, Jones* v. *Palmer*, [1895] 2 Ch. 649, where there was a trust for the encouragement of yacht racing, it was held both by Kekewich, J., and the Court of Appeal, that a trust for the promotion of sport merely for sport's sake was not charitable. So, too, in *Re Patten, Westminster Bank, Ltd.* v. *Carlyon*, [1929] 2 Ch. 276, Romer, J., held that a gift to the Sussex County Cricket Club for the benefit of a "nursery fund", the object of which was the training of young professionals, was not charitable, as being merely to encourage cricket.

But once sport has a wider object a trust for its encouragement may well be charitable, the element of public benefit being satisfied. So in *Re Gray, Todd* v. *Taylor*, [1925] Ch. 362, a gift for the promotion of sport was held charitable because it had the ultimate purpose of promoting the physical efficiency of the army. In *Re Mariette, Mariette* v. *Governing Body of Aldenham School*, [1915] 2 Ch. 284, Eve, J., held charitable a gift for building fives courts. Indeed, the learned Judge seems to have considered this particular trust to be one for the advancement of education rather than one for "other purposes beneficial to the community", his *ratio decidendi* being that it was essential in a school of learning of the description of Aldenham School that there should be organised games as part of the daily routine; but it is respectfully submitted that the trust in question might equally well have been justified as falling within the fourth division of charities. Eve, J.'s decision seems to have been influenced by the fact that the school was itself a charity, so that the gift in question might have been left for the purposes of the charity in which case it could have been used for the purposes for which it was in fact expressly given. "I cannot", said his Lordship (at p. 289), "in these circumstances, bring myself to think, because the testator has indicated his intention that in the hands of the charity this money shall be used for the particular purposes stated in his will, that the gift is thereby vitiated. On the contrary I think that the gift is a good charitable gift. It is a gift to a charity for purposes which seem to me to be included in the objects of the charity". In *Re Hadden, Public Trustee* v. *More*, [1932] 1 Ch. 133, Clauson, J., held that a gift for the provision of playing fields, parks and

gymnasiums was charitable because it was for the health and welfare of the working classes of Nottingham.

Accepting the proposition that the encouragement of sport is desirable as promoting physical fitness and thus in divers ways working a public benefit, we have the same illogicality as in the case of trusts for educational purposes. Where the beneficiaries of a trust for the encouragement of sport are the working classes of Nottingham, or officers of a regiment, or boys at a public school, the trust is charitable. But where the beneficiaries are the employees of a firm such a trust is clearly—in view of *Oppenheim* v. *Tobacco Trust, Ltd.*—not charitable. Yet a similar trust in favour of all those engaged in the tobacco trade in the City of X presumably would be charitable. Again it depends on the words used in creating the trust. Moreover, were the tobacco trade to be nationalised and taken over by a public corporation, a trust not charitable before would promptly become charitable.

Summary

To sum up, then, what effect have the recent cases had on the law of charitable trusts? The majority decision of the House of Lords in *Oppenheim* v. *Tobacco Trust, Ltd.*, has resulted in no relaxation of the strict rules applicable in determining whether or not a trust for educational purposes is charitable; and it seems safe to say that trusts for religious purposes and trusts for "other purposes beneficial to the community" within the fourth class of Lord Macnaghten's division of charities in *Income Tax Special Purposes Commissioners* v. *Pemsel* are in a similar position. The Court of Appeal's decision in *Re Scarisbrick's Will Trusts* has removed an anomaly by putting the "poor relations" cases all on the same footing whether or not the trust concerned is of perpetual continuance; but subject, apparently, to the proviso that a gift to a class no wider than the statutory next-of-kin of the *propositus* is not charitable. Otherwise there is no change in the anomalous position of trusts for the relief of poverty, exemplified by the "poor relations" cases—such as *Re Scarisbrick's Will Trusts*—and the kindred line of cases of trusts for the benefit of employees or others linked together by a relationship which, though not of blood, is yet essentially personal. In *Oppenheim* v. *Tobacco Trust, Ltd.*, Lord Simonds and Lord Morton of Henryton referred to the poverty cases, but their Lordships were not directly concerned with them and they were careful to stress that, while not expressly approving them, they were not to be taken as casting doubt upon their correctness; Lord Simonds spoke of how unwise it would be to do

so " . . . in order to introduce a greater harmony into the law of charity as a whole " ([1951] A. C. 309). So the discord remains, and it is easy to agree with the closing words of Lord MacDermott's speech, where he said ([1951] A. C. 319) : " It is a long cry to the age of Elizabeth and I think what is needed is a fresh start from a new statute ".

NOTICE TO TRUSTEES OF DEALINGS BY TENANT FOR LIFE

By E. O. Walford, LL.D., Solicitor

It is the duty of a tenant for life, save as otherwise expressly provided by the Settled Land Act, 1925, to give notice by registered post to each of the trustees of the settlement and to their solicitor, if known to the tenant for life, of his intention to make a sale, exchange, lease, mortgage or charge or to grant an option. Such notice is to be given at least one month before the dealing or contract for the dealing in question : S. L. A., 1925, s. 101 (1). The notice will not be valid unless at the date of the notice there are two trustees of the settlement unless the sole trustee is a trust corporation, *ibid.*

The words " save as otherwise expressly provided " cover the case in which a lease is being granted for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without the taking of a fine, the lessee not being " exempted from punishment for waste " : S. L. A., s. 42 (5). In passing, it may be noted that a purchaser dealing in good faith with the tenant for life is not concerned with the question whether notice has been given to the trustees, and is entitled to assume that the rent is the best rent that can reasonably be obtained. In cases of this kind the tenant for life may grant the lease even if there are no trustees of the settlement: S. L. A., 1925, s. 42 (5) (i) (*b*).

No Trustees

It is also provided by section 110 (4) of the S. L. A., 1925, that " where no capital money arises under a transaction, a disposition by a tenant for life or statutory owner shall, in favour of a purchaser of a legal estate, have effect under that Act notwithstanding that at the date of the transaction there are no trustees of the settlement ".

It might be thought that the effect of that provision was that even if the proposed dealing, say a lease, was not within the excepted class above mentioned, the tenant for life was under no obligation to give notice, and that, therefore, it was quite unnecessary for him to await the appointment of trustees of the settlement before granting the lease. In the case of a settlement of a property

of small value it will be understood that the temptation to save the expense of an appointment of trustees or even of one additional trustee, in reliance upon the sub-section last mentioned, may be considerable, but the tenant for life should not yield to it. The sub-section is designed for the protection of a person who has no knowledge whether notice has been given to trustees or not. He is protected where there are trustees, but no notice has been given to them, in all cases where no capital money has to be paid to them, by virtue of section 101 (5) of the Act, which exempts him from the obligation even of enquiring whether any notice has been given to the trustees, if he is dealing in good faith with the tenant for life. That sub-section is supplemented by section 110 (4), which renders the lease valid in such cases notwithstanding the fact that there are no trustees.

Where Capital Money Payable

Even if the case is one in which capital money is payable, and the trustees are joined to receive the purchase price, the purchaser's title is not affected by the absence of prior notice to the trustees of the intention of the tenant for life to grant the lease, if the purchaser is not aware of the absence of such notice: *Hatten* v. *Russell*, 38 Ch. D. 334.

The position of the tenant for life is quite different. He is a trustee exercising statutory powers and must "have regard to the interests of all parties entitled under the settlement": S. L. A., 1925, s. 107 (1); he is under "the duties and liabilities of a trustee for those parties", *ibid.* Consequently, if a purchaser (including a lessee) knows that the tenant for life is exercising the power improperly, the purchaser can refuse to complete: see *Hatten* v. *Russell* (*supra*); and see *Mogridge* v. *Clapp*, [1892] 3 Ch. 382 at p. 395, *per* Lindley, L.J. Conversely, it has been held in Ireland that a lessee is not entitled to enforce a contract for the grant of a lease where he knew that there were no trustees of the settlement: *Hughes* v. *Fanagan*, 30 L. R. Ir. 111.

Duty of Tenant for Life

There is little doubt that the requirement of notice to the trustees (which, as will have been seen, is not confined to cases where capital moneys are receivable) is for the protection of all persons interested under the settlement, in order to allow the trustees time to seek the aid of the Court in restraining an improvident or other improper exercise by the tenant for life of his powers. Hence, if he neglects to give notice to the trustees he is acting improperly and, however he may press upon his solicitor the point that the dealing will, if

carried out, be effective in favour of the purchaser, and that the appointment of trustees, or the giving of notice if there are trustees, is an unnecessary expense, his solicitor should resist all such arguments. If he yields, and the tenant for life is required to pay damages for an improper or excessive exercise of his powers he will probably endeavour to shelter himself behind the plea that his solicitor should have protected him. This point is emphasised because the writer was called upon to advise recently where the solicitor concerned for the tenant for life was anxious to assist his client and thought that the expense of appointing a second trustee might make the proposed transaction so expensive as to prevent its fruition.

One Trustee Only

Whilst dealing with this point, it may be noted that a single surviving trustee cannot either give a receipt for capital money or receive a valid notice : as to notice, see section 101 (1) (proviso), which applies even if no capital payment is receivable.

Notice to a trustee may be waived by him either in any particular case or generally, or he may accept less than a month's notice : S. L. A., 1925, s. 101 (4).

The desirability of that provision may perhaps be questioned, particularly in relation to a mortgage (where a *specific* notice of intention to create the mortgage must otherwise be given, s. 101 (2)), and to a sale or other dealing where part of the settled land is being permanently disposed of. However, although the trustees may, if they think fit, take steps to bring the proposed dealing before the Court with the object of restraining the tenant for life from proceeding with a dealing which the trustees conceive to be improvident or otherwise improper, they are under no obligation to do so, and incur no liability by reason of their failure to do so : S. L. A., 1925, s. 93 as read with s. 97 (a).

Notice to Trustees' Solicitor

A rather curious point arises in connection with the requirement of notice to the solicitor acting for the trustees (if any). Assuming that such solicitor is known to the tenant for life, as will generally be the case, it will have been observed that by virtue of section 101 (1) (b) of the Act notice of the dealing must also be given to that solicitor, and there is no provision in the Act for waiver of such notice. Upon receipt of the notice it would clearly be the duty of the solicitor, in normal cases, to send a copy of the notice to the trustees or to inform them of the gist of the notice.

Inquiry as to Trustees and Title

Although a person dealing in good faith with a tenant for life, in a case where notice to the trustees is requisite, is not concerned to inquire whether notice has been given : section 101 (5). The Act does not state that the purchaser is not concerned to inquire whether there are any trustees of the settlement. Before 1926 it was held that he should do so : *Hatten* v. *Russell* (*supra*). That would still appear to be the position ; but now there will be " certified " trustees by virtue of section 110 (2) of the Act, subject to the proviso to that sub-section under which it will be necessary to examine the settlement, and the first vesting instrument under it, in the cases covered by that proviso. In the case of a sale, the purchaser will, or should, automatically receive the necessary information as to the trustees. In the case of a lease, he may not; but generally where any substantial sum is involved a prudent solicitor acting on behalf of the lessee will in fact press for reasonable deduction of the lessor's title. The Council of the Law Society indicated some years ago that in its opinion a solicitor ought, when acting for a lessee, to make the same searches as would be made on a purchase unless otherwise instructed by his client, but did not go so far as to say that he should require that the lessor's title should be deduced where possible. In the case of a lease by a tenant for life, where a premium is payable it will be paid to the trustees of the settlement. A prudent solicitor will endeavour to stipulate for production of the title to the reversion, or at least some satisfactory evidence of such title; and in the course of examination of the title the existence or otherwise of trustees of the settlement will normally be ascertained. It is the accepted view of text book writers that upon a purchase the purchaser is still bound to ascertain that there are trustees of the settlement to whom the purchaser can pay capital moneys. And in the case of a lease at a premium it is submitted that it is the duty of the lessee's solicitor to endeavour to obtain evidence of the lessor's title despite the provisions of section 44 of the Law of Property Act, 1925 : see the remarks of Rigby, L.J., in *Imray* v. *Oakshette*, [1897] 2 Q. B. 218. The decision in *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610, revealed the flimsiness of the protection afforded by section 44 (5) of the L. P. A., 1925, to a lessee, owing to the conflict between that sub-section and section 198 of the L. P. A., 1925, which renders a registered land charge notice to all the world, and consequently to an underlessee, despite the fact that section 44 (5) appears to absolve him from any liability to investigate the superior lessor's title. To avoid misconception, it should be mentioned that the effect of section 44 (2) and (4) of the L. P. A., 1925, is that under

an open contract an intended lessee cannot call for his lessor's title if the lessor is the freeholder (or purports to be so); but if the lessor is a leaseholder the intended underlessee can call for the title of the lessor to the lease out of which the lessor is granting the proposed underlease. The intended underlessee cannot, however, call for the deduction of title to any superior lease or for production of such superior lease under an open contract.

Protection of Purchaser

Returning then to the sub-section mentioned in an earlier part of this article, namely sub-section (4) of section 110, which protects a person who is engaged in a dealing with a tenant for life which does not involve the payment of capital money, notwithstanding the fact that there are no trustees of the settlement, it will be seen that that sub-section will apply to a case in which the lessee does not or cannot obtain deduction of the title of the tenant for life. Normally a person acquiring an interest in land from the tenant for life must satisfy himself that there are trustees of the settlement, so far as the post-1925 "curtain provisions" enable him to do so. If, however, he or, for that matter, any other person who is engaged in a transaction with a tenant for life which does not involve the payment of capital moneys fails to discover the fact that there are no trustees of the settlement, the absence of such trustees will not invalidate the title.

No Title to Ground Rent Leases

Whilst the point is not strictly relevant to the subject of this article but merely incidental, it may be permissible to express surprise that the above mentioned sub-sections (2) and (4) of section 44 and similar provisions in earlier statutes were made applicable to leases at a ground rent, where, as is normally the case, a substantial capital payment is made by the lessee. The result is that when a ninety-nine years' lease at a premium (where the dealing is in fact a sale) has been granted for only a few years, and is then being sold, there is often great difficulty in obtaining satisfactory evidence of the title of the lessor to grant the lease. It is seldom that the lessee's solicitor can produce any such evidence. A reversal of the rule (precluding investigation of title under an open contract) as to leases granted at a premium of say £500 or upwards would, it is submitted, be desirable even if the rule remained in effect as to other leases. It is perhaps unreasonable that a lessor receiving a small premium should be put to the expense of deducing title; but it does not follow that the intended lessee should be debarred from requiring

the deduction of title at his own expense, if he is prepared to incur that expense. Although the last observations have no special relevance to settled land, they apply with equal force to leases granted by persons purporting to be tenants for life. In general a lessor granting a lease at a rack rent does not even disclose whether he *is* a tenant for life; but relies on the rule that he is under no obligation to disclose his title, if any. Moreover, by limiting his covenant for quiet enjoyment in the usual way a lessor would be immune from any claim under that covenant if the lessee were evicted by reason of the fact that the lessor had no title whatever to the land, as the common form covenant for quiet enjoyment does not extend to persons who do not claim *under* the lessor.

CORRESPONDENCE

LEASEHOLD PROPERTY (TEMPORARY PROVISIONS) ACT, 1951

Dear Sir,

We have read with interest Mr. J. Muir Watt's article on the Leasehold Property (Temporary Provisions) Act, 1951, in *The Conveyancer and Property Lawyer* for July/August, 1951.

The learned writer states (p. 225) "A place" which receives clothing for dry or other cleaning is not within the Act. Is there any specific authority for the statement, as in the absence of such authority we should have thought the matter not free from doubt? We act for clients who carry on the business of dyers and cleaners. They have many branches where clothes are received for dyeing or cleaning. The matter is, therefore, one of some importance to our clients.

In section 20 of the Act a shop means premises occupied wholly for business purposes, and so occupied wholly or mainly for the purposes of a retail trade or business. "Retail trade or business" has the same meaning as in the Shops Act, 1950. If one turns to the Shops Act, 1950, and to section 73, which defines retail trade or business, the definition of what may be a retail trade or business does not seem to us to be intended to be exhaustive but rather intended to define certain trades or businesses which are to be included in the definition in case of doubt. "Shop" as defined by the same section includes "any premises where any retail trade or business is carried on". It would therefore include the specific trades or businesses mentioned in the definition "retail trade or business", but it does not seem to us to follow from this that it may not include other retail trades or businesses.

It is interesting to note that under the Town and Country Planning (Use Classes) Order, 1950, section 2 (2), "shop" means a building used for . . . reception of goods to be washed, cleaned or repaired, which we submit covers a place which receives clothing for dyeing, dry or other cleaning.

According to *Erichsen* v. *Last* (1881), 8 Q. B. D. 414, "when a person habitually does and contracts to do a thing capable of producing profit and for the purpose of producing profit he carries on a trade or business". This definition seems exactly to fit the activities of our clients and to establish that they do carry on a trade or business.

In our opinion the trade or business carried on by our clients would come within the provisions of the Landlord and Tenant Act, 1927, in respect of compensation or the grant of a new lease, and if they come within the provisions of this Act, it seems to us that it would be illogical to hold that they do not come within the provisions of the Leasehold Property (Temporary Provisions) Act, 1951.

Perhaps we are beating the air and there is a short and simple answer to our doubts.

That our clients are carrying on a trade or business seems to us irrefutable; that business is carried on by them for the purpose of profit; the dyes used by them on articles dyed are commodities and are included in the charge for dyeing, so that the price paid for any article dyed does in effect include some amount for something sold, namely, the dye.

Yours faithfully,

LITHGOW, PEPPER & ELDRIDGE.

84 Wimpole Street,
London, W.1.

[Mr. Muir Watt replies as follows: Messrs. Lithgow, Pepper & Eldridge raise an interesting point. During the Report stage of the Bill in the House of Lords Lord Simon moved an amendment to add to the definition of "shop" the words—

"Or for the reception of goods to be washed, cleaned or repaired".

The Lord Chancellor rejected this proposed amendment on the ground that it would widen the scope of the Bill too much and that other types of business would claim to be included. He preferred to restrict the scope of Part II, apart from the special cases expressly mentioned, to shops in the ordinary sense of the word where buying and selling were carried on. Lord Simon asked leave to withdraw his amendment.

It is, therefore, clear that two lawyers of the eminence of Lord Simon and the Lord Chancellor considered that the Act does not cover premises for the reception of clothes for dry or other cleaning.

The authority cited by your correspondents to the contrary, *Erichsen* v. *Last* (1881), 8 Q. B. D. 414, was a revenue case which turned upon the meaning of the expression "trade exercised within the United Kingdom" in a taxing statute. It was not a Shops Act decision. The definition of "shop" in the Town and Country Planning (Use Classes) Order, 1950 (SI 1950, No. 1131) specifically "includes" a building for the reception of goods to be washed, cleaned or repaired. This express inclusion indicates that the ordinary meaning of "shop" would not cover such a building.

Against your correspondents' contention are the *dicta* of Lord Trevethin, C.J., and Avory, J., in a Shops Act case, *Dennis* v. *Hutchinson*, [1922] 1 K. B. 693, Lord Trevethin, C.J., said: "*Prima facie* a shop is a place where goods are sold by retail and stored for sale" (*ibid.*, p. 697). Avory, J., said: "It seems to be quite clear that the ordinary dictionary meaning of 'shop' is a place where ordinary retail selling and the serving of customers takes place".

The rating case of *Ritz Cleaners, Ltd.* v. *West Middlesex Assessment Committee*, [1937] 2 K. B. 642, might be cited in favour of your correspondents. In that case it was held that premises occupied by cleaners and dyers were primarily occupied and used for the purposes of a "retail shop" as defined by the Rating and Valuation (Apportionment) Act, 1928. The relevant definition there was, however, somewhat different from the Shops Act definition. It ran:—

"'Retail shop' includes any premises of a similar character where retail trade or business (including repair work) is carried on".

It is clear that the words in brackets "(including repair work)" influenced the Court. Greene, L.J., said, for example (*ibid.*, p. 670), that the word "retail" is normally confined to sales but the reference to repair work showed that the expression had an extended meaning. He thought that cleaning, although not itself repair work, was analogous thereto, and rested his judgment on this ground.

It is not denied that the authorities on this subject are somewhat unsatisfactory, but it is submitted that Lord Simon and the Lord Chancellor were correct in thinking that premises used for the reception of goods for cleaning are not shops within the Shops Act definition, although undoubtedly business premises (and even shops for other purposes, such as the Use Classes Order).]

THE SCHOOL SITES ACTS

Dear Sir,

May I be allowed to reply, as briefly as possible, to Mr. Burnett-Hall's most interesting comments (*ante*, p. 266) upon my paper on the above subject (*ante*, p. 153)?

It seems to me that the essential feature of the grants in both the cases mentioned was that the premises were to be used (a) as a Weekday School

under Church auspices and (b) as a Sunday School. The question whether (b) is co-equal with or is subsidiary to (a) was decided in the latter sense in *Shadwell's Case* unless, as Mr. Burnett-Hall suggests, that decision has been blown upon by the Court of Appeal in *Price's Case*. The latter is not an easy decision but, as I understand the judgments, the Court was concerned with the question whether, so far as (a) was concerned the trusts were primarily religious or primarily educational. In other words the majority decided that for the purposes of the grant a Weekly School under secular auspices was as good as, or almost as good as, one under Church guidance; Buckley, L.J., came to the opposite conclusion. The Court never considered, and never was called upon to consider, any proposal for a Sunday School with no Weekly School at all. Indeed at p. 687 Cozens-Hardy, M.R., dismisses the Sunday School as "optional only, according to the desire not of the trustees but of the clergyman"—which surely reinforces rather than weakens the decision in *Shadwell's Case*.

In my view, therefore, *Shadwell's Case* remains good law because the Court in *Price's Case* were not in any way concerned with and did not apply their minds to the point at issue in the earlier case. But the point is a nice one and I would be the first to admit that Mr. Burnett-Hall and not I may be right. Indeed I hope that he is for there would then be a further weapon with which to fight to save these essentially local institutions from the maw of the Ministry.

Yours faithfully,

G. Boughen Graham.

8 New Square, W.C.2,
September 5, 1951.

AGRICULTURAL HOLDINGS AND MINERAL WORKINGS

Dear Sirs,

In 1948 we had occasion to prepare a tenancy agreement and used the precedent on p. 369 of Vol. 12 of *The Conveyancer*.

The landlords (the owners in fee simple of the farm) are sand and gravel merchants, and since the date of the agreement they have entered upon certain parts of the farm without notice for the purpose of working the sand and gravel deposits. The tenancy agreement contains an exception and reservation of mines and minerals with power to work the same as set out on p. 370 of the said volume.

By virtue of the sand and gravel workings, the surface of the land is naturally disturbed, and from past experience the landlords state that they are unable to restore the surface until a period of from three to five years has elapsed. Even if the tenant re-enters upon the land restored after that period has elapsed, it will be "poor" land for another five years or so.

In the past the landlords have paid to the tenant compensation for damage done, in accordance with the terms of the agreement, and such compensation has been agreed between their respective valuers.

The tenant has recently claimed that in addition to the compensation to which he is entitled under the agreement, he is also entitled to compensation for disturbance and for an away-going crop under the provisions of the Agricultural Holdings Act, 1948. He also claimed that since there was nothing in the agreement requiring notice from the landlords prior to their entering upon the farm or any part thereof for the purpose of working the minerals, etc., then the provision as to mines and minerals contained in the agreement was void since it had the effect of depriving the tenant of his claim to compensation under the said Act (section 65 (1) of the 1948 Act;

Re Disraeli's Agreement, [1938] 4 All E. R. 658; *Coates and Others* v. *Diment,* [1951] 1 All E. R. 890).

We contended that the tenant was not being required to deliver up possession of anything demised to him and was only being required to do what the agreement allows, *i.e.*, to permit the landlords to enter on the farm for the purpose of working the minerals, etc., and that he was *not* being required to quit an agricultural holding.

The matter has now been compromised, but we are still in some doubt as to the position should the matter arise again in the future.

It occurs to us that it may be wiser to amend the precedent so as to require the landlords to give say three months' notice in writing of their intention to enter upon the farm for the purpose of working the minerals, etc. This would then give to the tenant an opportunity of claiming compensation under the Act.

However, we should be glad to have your comments, as we have no desire to make a free gift of compensation under the Act to a tenant, if the true position is in accordance with paragraph six above.

Yours, etc.,
KIRBY, SON & ATKINSON.

[Mr. Muir Watt replies as follows:—

I agree with the view expressed by Messrs. Kirby, Son & Atkinson in the sixth paragraph of their letter, where they say that there is no question of the tenant being required to quit an agricultural holding and that therefore the decisions in *Re Disraeli* and *Coates* v. *Diment* do not apply. The minerals are reserved by the tenancy agreement and the right to enter and work them is not to my mind equivalent to a right to resume possession of part of an agricultural holding. I do not think therefore that it is necessary to amend the precedent so as to require the landlords to give, say, three months' notice in writing of their intention to enter upon the holding for the purpose of working the minerals.]

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Mortgage—attornment clause—application of Agricultural Holdings Act, 1948, *s.* 2 (1), *s.* 23 (1).—" This case illustrates again," said Danckwerts, J., in *Steyning and Littlehampton Building Society* v. *Wilson*, [1951] 2 All E. R. 452, at p. 453, " the undesirability of retaining in mortgages an attornment clause which is entirely obsolete, and, at the present time, serves no useful purpose." The mortgage in question was secured over property comprising a market garden and the attornment was " at the yearly rent of 6d. if demanded " determinable by entry after three days' notice in writing. The mortgagor resisted the order for possession after such notice to quit had been given by the mortgagees on the grounds that the attornment clause had created an agricultural holding under the Agricultural Holdings Act, 1948, and that the notice must comply with section 23 of that Act.

The learned Judge in finding for the plaintiffs, pointed out what odd results would arise if the Act was held to apply to the terms of years created by section 85 (2) of the Law of Property Act, 1925, or by attornment clauses, and said, " it seems to me that these Acts cannot have been intended to apply to anything other than true transactions between landlord and tenant in respect of agricultural holdings ".

The learned Judge also referred to his own earlier decision concerning the effect of the Rent Acts on attornment clauses in *Portman Building Society* v. *Young*, [1950] 2 All E. R. 443, reversed by the Court of Appeal ([1951] 1 All E. R. 191), in which, though there was no direct assistance to decide the present case, the learned Master of the Rolls had noted (at p. 192) that the present-day mortgagee cannot become legal owner of the land and therefore it was possible that there could never be a tenancy in the strict sense of the term.

This case fully shows the kind of trouble that the mechanical draftsman is liable to bring upon himself, in that it can be as expensive to add what is unnecessary as to make any other mistake.

Land charge — contract to grant underlease not registered — enforcement against purchaser—liability of vendor.—The grantor of an interest in land which should be registered as an estate contract, is liable in full to the grantee, where, without having registered he assigns the reversion to a purchaser who takes with or without notice of that interest. This was decided *obiter* by Harman, J., in *Hollington Bros., Ltd.* v. *Rhodes*, [1951] 2 All E. R. 578, following the

judgment of Wynn-Parry, J., in *Wright* v. *Dean,* [1948] 2 All E. R. 415.

The plaintiffs entered into negotiations for an underlease for a short term of certain premises from the defendants, and entered into possession. The underlease and counterpart were executed but were never exchanged though the plaintiffs periodically asked for this to be done. The defendants then assigned their head lease to a company, subject (contrary to the facts in *Wright* v. *Dean, supra*) to the plaintiffs' underlease, and on the day of the assignment the company gave the plaintiffs notice to quit on the footing that they were in fact only yearly tenants. Of course, no agreement to grant an underlease had been registered. The plaintiffs were thereby forced to take a new underlease from the company at an increased rent and with a premium. They then sought full damages against the defendants for breach of an alleged contract to grant them an underlease.

Harman, J., having decided that there was no contract as alleged, nevertheless decided to express his opinion presuming conversely that the contract did in fact exist. While noting section 200 (4) of the Law of Property Act, 1925, he agreed with Wynn-Parry, J., in *Wright* v. *Dean* (*supra*), that there was no duty on the plaintiff to register, but would not agree to the defendants' contention that the company took subject to the plaintiffs' interest. "I do not see how that which is void" (section 13 (2), Land Charges Act, 1925) "and that which is not to prejudice a purchaser" (section 199 (1), Law of Property Act, 1925) "can be validated by some equitable doctrine." Earlier he said, "the fact is that it was the policy of the framers of the legislation of 1925 to get rid of equitable rights of this kind unless registered."

Therefore, on the assumption he had made, the learned Judge would have found the defendants liable for breach of contract to the full measure claimed (following again *Wright* v. *Dean* (*supra*)), namely, the premium plus the excess of rent payable during the period of the underlease.

Easement—reservation of rights in head lease—underlessees precluded from objecting.—In *Blake & Lyons, Ltd.* v. *Lewis Berger & Sons, Ltd.,* [1951] W. N. 425, the plaintiffs were underlessees of certain premises containing an ancient light. The head lease had been granted subject to the right of the landlord to approve the alteration in the height and extent of the adjacent property. The defendants, lessees of adjacent property vested in another landlord, obtained permission from the first landlord to alter their building and commenced to do so. The plaintiffs then sought an injunction against them and damages.

Wynn-Parry, J., held that the plaintiffs had no easement of light because the reservation in the head lease could not, without some reason being shown, be cut down and held to include only those adjacent properties or buildings which belonged to the landlord, and secondly, the head lease was an agreement within section 3 of the Prescription Act, 1833, and therefore the easement of light was not absolute but enjoyed by consent only.

Appointment by appointor of himself as trustee—section 36 (6), *Trustee Act,* 1925.—". . . The Court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms. . . ." This rule of construction as formulated by Denning, L.J., in *Royal Crown Derby Porcelain Co., Ltd.* v. *Russell,* [1949] 1 All E. R. at p. 755, was adopted by Evershed, M.R. in *Re Power's Settlement Trusts,* [1951] 2 All E. R. 513, affirming the decision of Wynn-Parry, J. (see note, *ante,* p. 185), that a person with power to appoint trustees has no power to appoint himself an additional trustee. The learned Master of the Rolls, with whom Birkett and Jenkins, L.JJ., agreed, thought that Parliament in re-enacting the power to appoint trustees to fill a vacancy (section 36 (1), Trustee Act, 1925), had clearly recognised the validity of the earlier decisions on the construction of such words as these, because by slightly varying the formula and adding the words in parenthesis " (whether or not being the persons exercising the power) " it was made plain that a power was added which would not otherwise be there. " This parenthesis . . . must be taken to have put, as it were, the *imprimatur* of Parliament on the judicial decisions. But when Parliament came to formulate its new provision in subsection (6), it then went back, and adhered strictly, to the old formula already judicially interpreted as excluding the donee of the power from being himself an appointee."

In coming to his decision with less " constraint and reluctance " than the learned Judge at first instance, he thought that there was a real difference between the power to appoint an additional trustee, and the power to appoint on a vacancy, for if the rule were otherwise the donee of the power in the latter case could appoint himself as trustee on the day following the creation of the settlement.

Power of tenant for life to direct change of investment—Settled Land Act, 1925, *s.* 73.—*St. Aubyn* v. *Att.-Gen.* (*No.* 2), [1951] 2 All E. R. 473, though a case concerning the exceedingly obscure and complicated estate duty provisions contained in Part IV of the Finance Act, 1940, gave rise to one interesting general point, namely, " whether it is competent for a tenant for life to direct the trustees to change an investment of capital moneys into another investment authorised by the " Settled Land Act, 1925, " or by the settlement ".

This question was decided in the affirmative and discussed solely by Lord Simonds; the other members of the House did not refer to it. " It would," he said at p. 487, " be at once illogical and inconsistent with the scheme of the Settled Land Act to give to the tenant for life the right to say whether the capital money should be applied in investments in securities or (say) in the discharge of incumbrances (section 73 (1) (ii)), or in the purchase of land in fee simple (section 73 (1) (xi)); and the right, too, to direct the sale of securities and the application of the proceeds in some other mode, but to deny him the right to direct a variation of investment." His Lordship also pointed out that section 75 (4), whereby investments

cannot be altered without the consent of the tenant for life, and section 75 (7), whereby the securities can be converted into capital money, both bore out his construction of the Act.

It is indeed surprising, as his Lordship said, that this question had not been settled long ago.

Direction by Court of settlement of lunatic's property—Reservation of power of revocation—section 171 (5), *Law of Property Act,* 1925.—In *Re C. W. M.,* [1951] 2 All E. R. 707, the Court of Appeal were called upon to construe section 171 (5) of the Law of Property Act, 1925, the interpretation of which has been as yet completely neglected. In *Re Greene,* [1928] Ch. 528, also in the Court of Appeal, to which the Court turned with some relief and applied in this case, the subsection is not expressly mentioned.

The problem was whether the Court were precluded under section 171 (5) when ordering a settlement to be made under section 171 (1), from omitting a power of revocation or other interest in favour of the patient in case of his or her recovery.

Before discussing *Re Greene* (*supra*), Somervell, L.J., thought that the words in the subsection " making due provision ", and further on " providing ", meant " there being due provision ", but that without *Re Greene* he would have found the case a difficult one. The Court rejected the submission that the decision in *Re Greene* was *per incuriam,* on the grounds that it was a case argued by many eminent counsel, with a reserved judgment, plainly proceeding on the basis of what Somervell, L.J., called the wider construction of subsection (5), " *viz.,* that, in considering the possibility of the patient's recovering, the Court is not compelled to insert in the settlement of the property settled either a power of revocation or some equivalent provision, but that it can . . . have regard to the resources which will be left unaffected by the settlement, and, if those are considered to be adequate in case the patient should recover, there is no need to put any reservation into the settlement ".

In this case some reliance was placed also upon the inherent jurisdiction of the Court to order what was requested, but Somervell, L.J., said that had the subsection had the narrower construction, he did not think that it could be overriden by virtue of any inherent jurisdiction.

Delegation of power of appointment—excessive exercise.—The judgment of Eve, J., in *Re Boulton's Settlement,* [1928] Ch. 703, has been applied by the Court of Appeal in *Re Morris's Settlement Trusts,* [1951] 2 All E. R. 528, where a substantially similar exercise of a power of appointment had been made. The power was to be exercised " in such shares and in such manner in all respects " as the appointor should appoint, and the appointor had, after validly appointing to certain persons a life interest determinable on bankruptcy, etc., attempted to create discretionary trusts during the remainder of the

lives of forfeiting life tenants, in favour of the life tenants and other persons in whose favour no appointment had been made.

The Court (Evershed, M.R., Jenkins and Birkett, L.JJ.) agreed that there was nothing to prevent a testator authorising a delegation such as this by appropriate language, but that the words used in this case were not wide enough. Jenkins, L.J., referred to *Re Joicey,* [1915] 2 Ch. 115 and *Re Greenslade,* [1915] 1 Ch. 155. The Court also had no difficulty in distinguishing the terms of the appointment from a valid power of advancement as in *Re Mewburn's Settlement,* [1934] Ch. 112, and in dismissing the suggestion that because " protective trusts " had been made in the instrument creating the power, that therefore the appointor could, by implication, make them also.

Settlement — payment out of share premium account, capital or income.—The Court of Appeal have affirmed the decision of Harman, J. (see note *ante,* p. 186), in *Re Duff's Settlement Trusts,* [1951] 2 All E. R. 534. Jenkins, L.J., in reading the judgment of the Court, having decided that the fund was capital money in the hands of the company said, at p. 537, " we think the hypothesis enjoined by the section " (section 56 of the Companies Act, 1948) " must follow the amount received by the trustee and determine its character and destination in the trustee's hands also. . . . It may therefore be said that section 56 recognises the essentially capital character of premiums received in the issue of shares ".

Estate agent's commission.—In *Trinder* v. *Haggis,* [1951] W. N. 416, Evershed, M.R., in what he described as the " hundredth case ", held that the commission to be earned in the event of " introducing a person willing to sign a contract to purchase at an agreed price ", meant merely a person who had shown willingness by signing a draft contract, and not as in ninety-nine other cases where the same words would have the effect of " find a purchaser ".

As the learned Judge observed, the case was remarkable and possibly unique in that the vendor had allowed the transaction to proceed to the stage of the purchaser signing the contract without himself giving any intimation in writing that he was willing to sell.

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2. *CHARITIES*

By A. K. R. Kiralfy, Ph.D., LL.M., of Gray's Inn, Barrister-at-Law

Non-existent charity — cy-près doctrine — costs of charities appearing.—*Re Preston's Estate,* [1951] 2 All E. R. 421; 2 T. L. R. 258. It is a well-known rule that where a testator makes a bequest

to a society described by a particular name, and such a society has never existed, the bequest may be administered cy-près if the name attributed to this imaginary society suggests a general charitable intention. There may be societies with similar, but not identical names. In such a case they may come in under the scheme if the Attorney-General consents, but this is a matter of discretion. In the instant case a testator made a bequest of residue to a specific non-existent organisation. It was held that none of the charities who appeared could identify themselves with this organisation. They were not allowed their costs out of the estate as from the time when they read the evidence in the case. Vaisey, J., held that none of their names really resembled the name used by the testator and there was no evidence that the testator had been interested in any of them. The charities might eventually be included in some scheme but this was unsure and in any case did not require their appearing in the proceedings.

(Theobald 285–286.)

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3. *WILLS*

Probate — revocation — executors incapable of acting. — In the Estate of Galbraith, [1951] 2 All E. R. 470; 2 T. L. R. 412. In this case both executors who survived and proved the will were failing mentally and physically. Probate was revoked and a grant of administration *de bonis non* was made. Karminsky, J., made the order noting that "there appears to be no reported case in which both executors have been released from their duties in this way".

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4. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Central Land Board—compulsory power to purchase at existing use value.—In *Travis* v. *Minister of Local Government and Planning,* [1951] 2 All E. R. 673, Devlin, J., rejected an attempt to limit the scope of the decision in *Earl Fitzwilliam's Wentworth Estates* v. *Minister of Town and Country Planning* (1 P. & C. R. 429; *ante,* Vol. 15, p. 189). An intending purchaser of a site for a house, having been asked nearly £200 for land whose existing use value was nearer £30, asked the Central Land Board to intervene. The Board did intervene, but as soon as they offered to purchase the land by agreement (as they must do, before proceeding to compulsory purchase: see Town and Country Planning Act, 1947, s. 43 (2)), the owner withdrew it from the market altogether. When the Board made

a compulsory purchase order, the owner objected, seeking to distinguish *Earl Fitzwilliam's Case* (*supra*) on the ground that the land was not on the market at the date of the order. The objection failed: the land had been "offered" for sale at an excessive price, and the withdrawal did not affect the Board's purchasing powers. A technical objection, based on the words "development for which permission has been granted" in section 43 (1), was also raised and also failed. The Board may purchase land compulsorily to resell it for development so long as planning permission for the development is obtained before the compulsory purchase order is confirmed by the Minister; the question whether it would not be sufficient to get permission even later, after purchase and before resale of the land, remains an open one.

Housing land—compulsory purchase—"needs of the district".—Watson v. *Minister of Health* (reported *sub nom. Re Havant and Waterloo U. D. C.'s Compulsory Purchase Order, etc.*, [1951] 2 All E. R. 664), adds yet another to the long list of unsuccessful technical objections to compulsory purchase orders. The point of law raised related to the power of local authorities to buy land on which to put houses built to satisfy the "needs of the district": the question being whether, when the surplus population of one area wants to move to another, it is the importing or the exporting district that "needs" the additional houses. Devlin, J., took the common-sense view that both do, so that either of the two local authorities can buy the necessary land. The moral of this case is the usual one, that when objecting to compulsory purchase procedure mere ingenuity is not enough.

Compulsory purchase—local authorities' land—special procedure.—Middlesex County Council v. *Minister of Local Government and Planning*, [1951] 2 All E. R. 732, on the other hand, illustrates the comparative ease with which local authorities may bring each others' acts into question. Under the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 1 (2) and Sched. I, Part III, the compulsory purchase of land "which is the property of a local authority" is "subject to special parliamentary procedure in any case where an objection to the [compulsory purchase] order has been duly made by the local authority . . . and has not been withdrawn". In the present case, a borough council made a compulsory purchase order, the county council objected, a public inquiry was ordered by the Minister, and then, two days before the inquiry, the county council bought the land. It was held that special parliamentary procedure (which allows scope for bringing political pressure to bear) must be followed: although the county council were not owners of the land when they objected they were owners at the date of the inquiry, and this was enough. Thus local authorities can invoke special parliamentary procedure not only in defence of their own land against attacks by rival authorities, but also in cases where rival schemes of development show signs of coming into conflict.

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5. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts — death of contractual tenant — widow residing in house at death—section 12 (1) (*g*) *of* 1920 *Act—widow entitled to remain in possession—previous authorities overruled.*—As many lawyers anticipated, the House of Lords in the important case of *Moodie* v. *Hosegood,* [1951] 2 All E. R. 582, have overruled the Court of Appeal decisions in *Thynne* v. *Salmon,* [1948] 1 K. B. 482, and *Smith* v. *Mather,* [1948] 2 K. B. 212. It is now held that the word "tenant" in section 12 (1) (*g*) of the 1920 Act includes a contractual tenant, with the result that the widow of a contractual tenant who was residing with him at the time of his death was entitled to remain in possession. There is no doubt that as a matter of construction this was always the more convincing view. The Court of Appeal were, however, impressed by the difficulties which would appear to arise if the contractual tenancy were to become vested under the ordinary law in the deceased's executors or administrators, for the benefit of the persons interested in his estate, whereas his widow or other relation were to take a statutory tenancy by virtue of section 12 (1) (*g*). Lord Morton of Henryton has now answered this problem by saying that the rights of persons entitled to the benefit of the contractual tenancy are subject to the special rights of the widow, or other member of the family, under section 12 (1) (*g*). Thus "if the contractual tenancy is determinable by notice, the landlord or the contractual tenant can determine it by giving the appropriate notice, but such determination will not affect the widow's rights and obligations under section 15, and, if no notice is given, the contractual tenancy will come into full operation when the widow gives up possession under section 15. If the contractual tenancy is a lease for years, it will remain in being, but so long as the widow remains in possession she, and not the contractual tenant, is bound to observe the terms and conditions of the lease and has the benefit thereof".

It is still a matter of importance from the point of view of a landlord to give notice to determine a contractual tenancy in these circumstances, since, if he does not, and the contractual tenant takes possession on the death of the widow (or other person who has taken advantage of section 12 (1) (*g*)) a notice to quit will then merely convert the contractual into a new statutory tenancy.

(Rent Restrictions Guide, 3rd ed., pp. 102–103.)

Rent Restrictions Acts—apportionment of standard rent—larger unit outside Acts by reason of its rateable value — apportionment "necessary".—The House of Lords in *Capital and Provincial Property Trust, Ltd.* v. *Rice,* [1951] 2 All E. R. 600, has affirmed the view taken by the majority of the Court of Appeal that apportionment may be "necessary" under section 12 (3) of the 1920 Act to determine the standard rent of a dwelling-house which at the relevant date was let as part of a larger unit even if that larger unit was

outside the Acts by reason of its rateable value, and thus no apportionment could be made under section 5 of the 1938 Act. The minority view of Denning, L.J., that under new control the standard rent cannot be determined by apportionment unless the larger unit is itself a controlled dwelling-house with a standard rent which can be apportioned, is rejected. This decision sets at rest an old controversy going back to *Sinclair* v. *Powell,* [1922] 1 K. B. 393, and *Barrett* v. *Hardy Brothers (Alnwick), Ltd.,* [1925] 2 K. B. 220, 223, and more recently discussed in *Upsons, Ltd.* v. *Herne,* [1946] K. B. 591. (For a criticism of Denning, L.J.'s views, see these Notes for September, 1950, pp. 329–330.)

(Rent Restrictions Guide, 3rd ed., pp. 49–50.)

Rent control—Rent Restrictions Acts and Furnished Houses (Rent Control) Act, 1946—*no power to do anything to "affect" the standard rent.*—The case of *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Marks,* [1951] 2 All E. R. 465, goes a step further than *R.* v. *Paddington and St. Marylebone Rent Tribunal, ex p. Bedrock Investments, Ltd.,* [1948] 2 K. B. 413, in limiting the jurisdiction of rent tribunals to reduce rent below the recoverable rent under the Rent Restrictions Acts. In the *Bedrock Case* it was decided that where furniture or services are sufficient to attract jurisdiction under the Furnished Houses (Rent Control) Act, 1946, but not sufficient to exclude the Rent Acts, so that the particular letting in question was governed by both sets of statutory provisions, a rent tribunal cannot reduce the rent below the recoverable rent under the Rent Acts. In the present case the particular letting was of a fully-furnished house, so that the general provisions of the Rent Acts were excluded. The letting was not, therefore, at one and the same time subject to both sets of statutory provisions. The house was, however, one within the rateable value limits of the Rent Acts and a standard rent had been established for it by a previous letting. This standard rent would again become applicable if the house were to be let unfurnished. The Divisional Court held that in these circumstances a rent tribunal had no jurisdiction to reduce the rent payable under the furnished letting below the recoverable rent which could be charged for the premises under the Rent Acts. To do so would, in a wider sense, "affect" the provisions of the Rent Acts, contrary to section 7 of the 1946 Act. Devlin, J., though not perhaps Hilbery, J., reached this conclusion without the need to construe literally section 4 of the 1946 Act as applying to all future lettings, whether furnished or not. It is suggested that it is better to adopt Devlin, J.'s *ratio decidendi* of the case, as deciding that the rent tribunal's reduction of rent was invalid because it was "an interference with the scheme of control operative under the Rent Restrictions Acts, none the less so because the flat in its furnished state is only contingently under their sway".

(Rent Restrictions Guide, 3rd ed., p. 118.)

Rent Restrictions Acts—claim for possession on ground of non-payment of rent—position when arrears paid into Court before hearing —statutory tenant.—In *Dellenty* v. *Pellow,* [1951] 2 All E. R. 716, the Court of Appeal held that there were grounds upon which the county court judge could properly hold that it was reasonable to make an order for possession against a statutory tenant on the ground of non-payment of rent, although the arrears had been paid into Court before judgment. The evidence disclosed a long history of default against the tenant. The Court of Appeal rejected an argument based on analogy with the position of a contractual tenant under section 212 of the Common Law Procedure Act, 1852, who had paid into Court arrears and costs and who would thereupon be entitled to ask for relief against forfeiture.

(Rent Restrictions Guide, 3rd ed., p. 85.)

Landlord and tenant—Rent Restrictions Acts—estoppel—notice of increase of rent not in accordance with agreement as to length of notice to quit.—The case of *Wallis* v. *Semark,* [1951] 2 T. L. R. 222, brings out two points of interest. The first is that the parties to a tenancy agreement are free to stipulate for any length of notice to quit they like, and they may agree that the length of notice to quit to be given by the landlord shall be different from the length of notice to be given by the tenant. In this particular case it had been agreed that whereas the tenant should give one month's notice the landlord had to give two years' notice. The second point was that a tenant who had paid an increased rent under a notice served by virtue of section 3 (2) of the 1920 Rent Act, by reason of an increase of rates, was not estopped by having made such payments from contending that the notice of increase was invalid as a notice to quit. The tenant was entitled to a two years' notice to quit. A notice to pay increased rent could, therefore, only have properly taken effect as a notice to quit under the Rent Restrictions (Notice of Increase) Act, 1923, at the end of two years.

(Woodfall, 24th ed., p. 951.)
(Rent Restrictions Guide, 3rd ed., p. 58.)

Landlord and Tenant Act, 1927 — *compensation for goodwill — "predecessor in title"—sub-tenant not predecessor in title.*—In *Williams* v. *Portman,* [1951] 2 All E. R. 539, it was held that a sub-tenant was not the tenant's predecessor in title within the meaning of section 4 (1) of the Landlord and Tenant Act, 1927, so as to enable the tenant to aggregate the sub-tenant's period of occupation with his own in order to make up the qualifying period of five years required to establish a claim for compensation for goodwill. The position was that the tenant had sub-let the premises for a time to a sub-tenant who carried on the same type of business, and, then, by virtue of an arrangement between the parties, had resumed possession

before the end of the sub-tenancy. It will be noted that the sub-tenant surrendered the residue of his sub-tenancy, and the tenant resumed possession by virtue of his own tenancy. He did not take over the unexpired portion of the sub-tenancy. It is possible that a tenant might succeed in adding his sub-tenant's occupation to his own under the section by taking over an unexpired portion of the sub-tenancy. This point is worthy of note by conveyancers.

(Woodfall, 24th ed., pp. 1075–1082.)

Agricultural Holdings Act, 1948—*attornment clause in mortgage of agricultural land—no agricultural tenancy created between mortgagee and mortgagor.*—In *Steyning and Littlehampton Building Society* v. *Wilson,* [1951] 2 All E. R. 452, Danckwerts, J., held that an attornment clause in a mortgage of agricultural land did not create a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act, 1948, so as to attract the provisions of that Act, such as the requirement that a twelve months' notice to quit must be served, security of tenure, and so forth. The Agricultural Holdings Act is intended to apply to genuine agricultural tenancies created for the purpose of farming the land, not to artificial relationships of the present kind. Danckwerts, J., remarked that this case illustrates again the undesirability of retaining in mortgages an attornment clause which is now entirely obsolete and serves no useful purpose. The case may be compared with *Portman Building Society* v. *Young,* [1951] 1 All E. R. 191 (*ante,* p. 62), where a previous decision by Danckwerts, J., was reversed.

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6. *REVENUE CASES*

By Desmond Miller, of the Inner Temple, Barrister-at-Law

Note:—Where a case is not reported in any of the general series of law reports it is cited from the *Annotated Tax Cases* (A. T. C.) or *Taxation Reports* (T. R.).

(a) Income Tax

Re Batley, [1951] Ch. 558; [1951] T. R. 195 (C. A.).

(1) *Statutory provisions*: Rules 19 and 21, The General Rules, the Income Tax Act, 1918.

(2) *Point*: Whether in any given case an annuitant is to be freed from the burden of income tax referable to his annuity is properly a question of construction to ascertain the testator's intent.

A clear expression of such intent is required but *semble* not necessarily a reference to income tax in terms. *Re Skinner,* [1942] Ch. 82, considered.

Napier v. *National Business Agency, Ltd.*, [1951] 2 All E. R. 264; [1951] T. R. 201 (C. A.).

(1) *Statutory provisions*: Regulation 7, the Income Tax (Employments) Regulations, 1944.

(2) *Point*: An agreement which is so framed as to defeat the *proper* claims of the Inland Revenue is contrary to public policy and will not be enforced.

(3) *Facts and Decision*: The plaintiff was engaged by the defendants as secretary and accountant. By the terms of his agreement he was entitled to be paid in respect of his services £13 per week salary and £6 per week as expenses.

After ten months' service the plaintiff was summarily dismissed and accordingly brought the action in which he claimed six or alternatively four months' salary in lieu of notice.

From the evidence it appeared that during the period of employment income tax under P.A.Y.E. had been deducted from the weekly salary of £13, and that the plaintiff had received £6 weekly as expenses.

Both parties to the agreement were at all times aware that apart from exceptional occasions the plaintiff would not incur any expenses; in fact during the period of employment his expenses did not exceed £1 per week.

The Judge at trial found that plaintiff and defendants had entered into the agreement knowing that the figure for expenses (*viz.*, £6 per week) was a sham figure which bore no relation to the expenses which would in fact be incurred, and that the object was the avoidance of income tax.

Held (dismissing the appeal):—

(i) that there was evidence to support the findings of the Judge at trial;

(ii) that the agreement in relation to expenses was intended to mislead the Inland Revenue and to evade the proper payment of income tax;

(iii) that the agreement was therefore contrary to public policy and unenforceable;

(iv) that the agreement could not be severed as between the parts dealing respectively with expenses and salary.

Higgs v. *Olivier*, [1951] T. R. 213 (Ch. D.).

(1) *Statutory provisions*: Case II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: A lump sum paid to an actor as consideration for a covenant not to appear in motion pictures for a specified period is not to be treated as a receipt of his profession or vocation:—

(i) in view of positive evidence that he had never previously entered into such an agreement; and

(ii) in the absence of evidence showing that transactions of this character were a normal feature of the acting profession.

(3) *Facts and Decision*: The respondent taxpayer, Sir Laurence Olivier entered into an agreement with Two Cities Films, Ltd., in 1943.

Pursuant to this agreement Sir Laurence undertook for reward to render services in the production and direction of the film " Henry V ". The services were to be rendered within a period expressed to expire not later than September, 1944.

Subsequent to the effluxion of the above quoted agreement the film was in due course exhibited, but initially with no great success. In July, 1945, the whole question was therefore discussed between Sir Laurence and the film company. In the result and with the sole object of promoting the success of the film " Henry V ", a further agreement was entered into between Sir Laurence and Two Cities Films, Ltd. Under its terms the company were to pay to Sir Laurence the sum of £15,000 as consideration for an undertaking by him not to appear in any capacity in connection with any film within eighteen months from the date of execution of the agreement.

Sir Laurence was assessed under Case II of Schedule D upon the footing that the sum of £15,000 was a receipt of his vocation.

The Special Commissioners decided that the agreements of 1943 and 1945 could not be read together; the taxpayer had performed all his services under the earlier agreement before the later came into existence. That the £15,000 was received not as part of the taxpayer's income from his vocation, but as consideration for his refraining from exercising that vocation, and that it was a capital receipt.

Held (affirming the Special Commissioners' determination):—

(i) that the question raised was an issue of fact;

(ii) that there was evidence before the Special Commissioners to support their finding;

(iii) that accordingly the Court would not interfere with the finding.

Re Lyons; *Barclays Bank, Ltd.* v. *Lyons and Others,* [1951] 2 All E. R. 507; [1951] T. R. 265 (Ch. D.).

(1) *Statutory provisions*: Section 34, the Income Tax Act, 1918; section 33, the Finance Act, 1926.

(2) *Point*: In normal circumstances where an annuity by will is bequeathed " free of income tax " the testator's presumed intention is to free the annuitant from the particular burden of income tax and not from some other burden such as—in this case—a loss in business.

Accordingly, where in any year such an annuitant is not liable to tax by reason of a loss claim under section 34 of the Income Tax Act, 1918, he is accountable under the rule in *Re Pettit,* [1922] 2 Ch. 765, for so much of the sum recovered by him from the Revenue, as represents repayment of tax paid in respect of his annuity, for that year.

(3) *Facts and Decision*: A testator bequeathed an annuity of £10 per week free of income tax to his son Michael, and the annuity was in fact paid by the trustees out of a taxed fund.

Michael's position in the years 1946–47 and 1947–48 was as follows:—

1946–47: annuity	...	£945	9	1	(gross required to produce a net of £10 per week less tax at 9s.)
Wife's earned income		97	0	0	
Other income	...	43	11	11	
Aggregate	...	1,086	1	0	
Business loss	...	1,027	0	0	
1947–48:	... ...	£963	12	9	(gross required to produce the net)
Wife's earned income		242	10	0	
Other income	...	12	10	0	
		1,218	12	9	
Less Bank interest and charges	...	65	18	8	
Aggregate	...	1,152	14	1	
Business loss	...	1,152	0	0	

For 1946–47 Michael claimed and obtained repayment of tax totalling £429 19s. 1d., and for 1947–48 £422 11s. 11d., pursuant to section 34, *supra*. The question raised by summons was (*inter alia*) whether Michael was accountable to the trustees for so much of each of the amounts repaid by the Inland Revenue as represented payment of tax by the trustees in respect of his annuity for the year in respect of which such sums were recovered.

Held: The testator's intention was to free the annuitant from the burden of income tax relative to his annuity but as in each of the years in question (*viz.*, 1946–47 and 1947–48) no income tax had been borne by reference to the annuity, the annuitant must account for the repayments secured by him.

Wildbore v. *Luker*, [1951] T. R. 277 (Ch. D.).

(1) *Statutory provisions*: Rules 3 (*a*) (*b*) and (*c*) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: Where premises are occupied partly for the purposes of trade and partly as living accommodation the amount properly to be deducted in respect of rates in computing the profits of the trade is a question of fact for the Commissioners' determination.

The deduction is not governed by Rule 3 (*c*) of the Rules applicable to Cases I and II of Schedule D, *supra*.

Bentley, Stokes and Lowless v. *Beeson,* [1951] 2 All E. R. 667; [1951] T. R. 281 (Ch. D.).

(1) *Statutory provisions*: Rule 3 (*a*) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: Moneys expended by a firm of solicitors in payment for luncheons attended by the clients and partner advising were held to be deductible under Rule 3 (*a*), *supra.*

Such expense, to be deductible, must be " wholly and exclusively " incurred for the purpose of the business; the rule does not state or require that the expense should be " necessary ". *Dicta* of Lord Cave in *Atherton* v. *British Insulated and Helsby Cables, Ltd.,* 10 T. C. 155 at p. 191, applied.

(3) *Facts and Decision*: The appellant taxpayers were a firm of solicitors carrying on business as such in the City of London. It was the practice of the partners to entertain clients to lunch in the West End, either at a club or restaurant, at which business was discussed. The clients were charged in the normal manner for legal advice given and the sole issue raised on appeal was whether the cost of such luncheons could be deducted in computing the appellants' profits for income tax purposes.

Evidence was given before the Special Commissioners to the effect:—

(i) that the entertainment was confined to existing clients;
(ii) that the balance of convenience both from the clients' and the solicitors' viewpoint was, in this manner, served;
(iii) that clients might have been lost had interviews taken place solely at the solicitors' office in the City
(iv) by a representative of the Law Society, that the Professional Purposes Committee of that body considered that the entertainment of existing clients whether with a view to retaining them as clients or of obtaining new business, was not unprofessional.

The Special Commissioners disallowing the appeal, found that the expenditure " while no doubt customary and a matter of good policy " was not necessary for the purposes of the business, and further expressed themselves as unable to conclude:—

> " that the moneys expended on entertainment were expended solely for the purpose of the profession and were entirely divorced from the element of hospitality and the relationship of host and guest ".

Held (allowing the appeal):—

(i) the statute did not require that the expense should be " necessary " and that the Commissioners therefore arrived at a wrong conclusion in applying a test which was erroneous in law;
(ii) that the second reason given by the Commissioners for their finding was also erroneous in that there was no evidence to support it.

R. v. *Morleston and Litchurch Commissioners; ex p. G. R. Turner, Ltd.*, [1951] T. R. 289 (K. B. D.).

(1) *Statutory provisions*: Section 149, the Income Tax Act, 1918.

(2) *Facts and Decision*: Subsequent to the hearing of an appeal to the General Commissioners, the clerk read out a decision purporting to be the decision of the Commissioners, in favour of the applicant. The respondent required a case stated and when this came to be drawn it appeared, and the case stated, that the Commissioners' determination had been in favour of the respondent.

Held: that the determination erroneously conveyed was not the determination of the Commissioners and further and in any event it was open to the Commissioners to alter their decision at any time until the assessments (under appeal) had been formally discharged.

Friends Provident and Century Life Office v. *Investment Trust Corporation, Ltd.*, [1951] T. R. 293 (H. L.).

Point: The decision turned upon the construction of a particular clause in a company's articles of association relative to the amount to be paid where a dividend was, as to part, to be " tax free ".

Dale and Others v. *C. I. R.*, [1951] 2 All E. R. 517; [1951] T. R. 209 (Ch. D.).

(1) *Statutory provisions*: Section 14 (3) (*a*), the Income Tax Act, 1918; section 47 (1), the Finance Act, 1948.

(2) *Point*: A trustee is the holder of an office, and remuneration received for the execution of the duties of trustee is a profit of that office. *Baxendale* v. *Murphy*, 9 T. C. 76 and *Hearn* v. *Morgan*, 26 T. C. 478, explained.

(3) *Facts and Decision*: The appellant taxpayer was appointed trustee of the Wellcome Foundation by the will of Sir Henry Wellcome deceased. The duties were onerous and the will accordingly provided for the payment of £1,000 per annum free of tax to the appellant so long as he continued as trustee.

The appellant was assessed to Special Contribution on the footing that his income as trustee was investment and not earned income.

The Special Commissioners decided, that in view of the decisions in *Baxendale* v. *Murphy* and *Hearn* v. *Morgan, supra,* to the effect that the remuneration of a trustee could not be directly assessed under Schedule E, they must hold that such remuneration could not arise from an office of profit within section 14 (3) (*a*) of the Income Tax Act, 1918, and *ex hypothesi* was not earned income.

Held (allowing the taxpayer's appeal):—

(i) the appellant taxpayer held the office of trustee;

(ii) that office was remunerated, and accordingly the annuity which he received as remuneration, was earned income within the meaning of section 14 (3) (*a*) of the Income Tax Act, 1918.

(b) Profits Tax

Union Corporation, Ltd. v. *C. I. R.*; *Johannesberg Consolidated Investment Co., Ltd.* v. *C. I. R.*; *Trinidad Leasehold, Ltd.* v. *C. I. R.*, [1951] T. R. 271 (Ch. D.).

(1) *Statutory provisions*: Section 39 (1), the Finance Act, 1947.

(2) *Point*: The operation of section 39 (1), *supra* (which affects the quantum of non-distribution relief in the case of non-resident corporations), is confined to persons not resident in the United Kingdom. (It will be remembered that for income tax and profits tax purposes there may be dual residence.)

Lamson Paragon Supply Co., Ltd. v. *C. I. R.*, [1951] T. R. 243.

(1) *Statutory provisions*: Sections 30, 35 and 36, the Finance Act, 1947.

(2) *Point*: A dividend paid from capital profits and admittedly not subject to sur-tax in the hands of the recipient shareholder is none the less a relevant distribution for profits tax purposes.

THE LIBRARY

The Leasehold Property (Temporary Provisions) Act, 1951. By J. Muir Watt, M.A., Barrister-at-Law. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 78 pp. and Index, Tables of Statutes and Cases. (7s. 6d.)

This is an admirable guide to a new and important Act which contains some very complex provisions. The author has gone to infinite pains to explain the effect of the various sections and has furnished examples showing how those sections will work in practice. He has not failed to deal with various difficult questions of construction.

In addition to the text, the Act itself is printed in full. Nor has the author been content with presenting the bare text of the Act: it is most generously annotated. Whilst there are one or two statements of opinion with which this reviewer does not agree, he does not propose to qualify in any way the opening remarks of this review. The author has produced a most excellent and practical guide to the Act.

E. O. W.

The Leasehold Property (Temporary Provisions) Act, 1951. By H. Heathcote Williams, K.C. London: Thames Bank Publishing Co., Ltd. 122 pp. (10s.)

Having regard to the view which this reviewer takes of the Act dealt with in the above work, it is perhaps fortunate that he is asked to review the book and not the Act. Whilst a case may certainly be established for the protection of occupying tenants on the expiry of their tenancies, and such protection is already afforded to persons occupying dwelling houses within the operation of the Rent Acts, it is submitted that it is as inequitable to allow a long lessee to occupy property at a nominal rent after his lease has expired as it would be to allow a short term tenant to do so, whether that state of affairs is to endure for two years, as provided in the Act, or for one day.

This book is by a well-known expert in the subject. It opens with a most useful introductory sketch of the Act, and continues section by section with the text of the Act, followed by the author's notes explaining the provisions of these sections, many of which are extremely complex. The author has furnished many useful illustrations of the operation of the Act. It can be said with confidence that any practitioner who is called upon to advise upon the effect of the Act should not rely upon a hasty perusal of the Act, but should refer to the notes in this book. Many of the sections, when analysed carefully, give rise to difficult questions of construction on which the author has shed much light. Its value is enhanced by the Appendices, where the Act is printed separately (so that one may readily have the whole of it before one at a glance). The author's Forms of Notice in Appendix IIIa should be of great assistance to busy practitioners.

E. O. W.

The Conveyancer's Year Book, 1950. By JAMES A. GIBSON, of Lincoln's Inn, Barrister-at-Law, assisted by C. N. BEATTIE and J. P. WIDGERY, of Lincoln's Inn, Barristers-at-Law. London: The Solicitors' Law Stationery Society, Ltd. 1951. xl and 170 pp. (30s. net.)

When Sir Lancelot Elphinstone, in 1940, inaugurated *The Conveyancer's Year Book,* he added to the lawyer's library an annual of outstanding value and further distinction to an honoured name in the history of conveyancing. The planning was on a generous scale and the contents were not strictly limited to the sphere of what has been termed "pure conveyancing". Succeeding years proved that practical utility which the first volume evinced to the full, and although such compilations as the invaluable *Current Law,* with its comprehensive scope, has covered in exhaustive epitome the ground which is the especial concern of *The Conveyancer's Year Book,* the former has not rendered the latter in any way superfluous, since it is the purpose of the *Year Book* to deal with its subject-matter more extensively by very reason of the limited range of its attention. Each year has seen some modification of its scope and the preface states that "the principal reason for the slender size of this volume was the absence in 1950 of any considerable body of legislation calling for notice in the *Year Book*". That may well be, but one would have thought that the gain in space might usefully have been turned to advantage by more numerous and widespread reference to contemporary legal literature, both in monograph and periodical form. As it is, the current issue has gone to the other extreme and no issue is recalled which contains less note of either form of publication. This is not to the good, since there is hardly a sphere of the law which is more covered by text writers and commentators than property law and conveyancing practice. Previous issues, and particularly the earlier ones, provided an easily found guide to the various contemporary writings and a guide which was often of the greatest practical avail. It is to be hoped that future issues will return to the old paths in this direction. Having due regard to the progressive limitation of scope of subject in recent years it may nevertheless be safely asserted that those responsible for the current issue have done their work with admirable efficiency. As usual the Revenue chapters promise to be of the greatest service and those on "Settlements", "Trusts and Trustees" and "Wills" should all prove useful. The present issue contains a well-prepared table of "Cumulative Contents of Volumes 7-11" and "Index" of subjects dealt with in the current issue, a very present help in trouble. One matter for congratulation is to be found in the fact that after some delay in earlier issues the publication is virtually up to date, the preface being dated June, 1951. One matter for consideration in the future is the printing of the names of the Founder and the successive Editors. Law books in the past were known for this token of "pietas" and historical significance. These virtues should not be allowed to become things of the past alone. It is hoped that the Annual will not be allowed again to fall into arrear. The *Conveyancer's Year Book* looks as if it is now established on a permanent footing, a footing that will be the better secured by a continuance of the regularity of appearance which this issue manifested, and by a restoration of the ampler guide to current conveyancing literature which proved so helpful in the past. It still stands as the most ever ready conveyancer's *vade mecum.*

BERTRAM B. BENAS.

A Guide to Compulsory Purchase and Compensation. Second edition. By R. D. STEWART-BROWN. London: Sweet & Maxwell, Ltd. 103 pp. (10s. 6d.).

This very useful book, the substance of which first appeared in 1948 in

the form of *Current Law Guide, No.* 6, now out of print, is a revised and up-to-date review of the law relating to compulsory purchase of land.

The Introduction to the book begins with the words: "The law relating to compulsory purchase of land has always been complicated, but today it has reached a stage when the ordinary practitioner might well be forgiven for abandoning in despair any attempt to unravel its complexities". Let it be said straightway that the learned author has, by his diligence and clarity, saved from despair the busy legal practitioner and other professional men seeking an introduction to a highly complicated subject. The Introduction concludes: "It is through this jungle of legislation that this book attempts to blaze a trail. Many bypaths must necessarily be left unexplored and there is little room for discussion of difficult and controversial points. The author feels that something will have been achieved if after reading this book a practitioner has a better idea of where to look for the law, and a grasp of the essential principles". The present reviewer is of the opinion that the book succeeds in the object which it sets out to achieve and deserves a place on the shelves of those for whom it was written.

A particularly helpful and concisely expressed chapter is Chap. 3 dealing with the three types of compulsory purchase procedure established by the Acquisition of Land (Authorisation Procedure) Act, 1946, namely:—

(a) the general method of compulsory purchase;
(b) the more intricate method (for special types of land) involving the grant of a Ministerial Certificate as to the giving of suitable exchange-land or, as the case may be, as to the lack of need for any such exchange-land; and
(c) the method which involves special parliamentary procedure as detailed in the Statutory Orders (Special Procedure) Act, 1945.

A mine of useful information neatly summarised is to be found in Appendices I and II which contain a list of the main Acts under which compulsory acquisition of land is authorised in accordance with the Acquisition of Land (Authorisation Procedure) Act, 1946, as originally enacted or as applied by subsequent Acts.

The book is neatly indexed.

D. H.

Land Charges. By R. N. D. Hamilton, Solicitor. Oyez Practice Notes No. 19. London: Solicitors' Law Stationery Society, Ltd. 64 pp. (6s. 6d.).

This little pamphlet will be found to include much sound practical advice and useful information on a subject of everyday importance. Most solicitors in private practice are well acquainted with the system of registration of land charges (the pamphlet does not deal with the mystery of *local* land charges), but they will find it useful to have all information under one cover.

On the vexed questions of when and against whom to search, the author is particularly helpful. Whilst giving full weight to *Re Forsey and Hollebone*, [1927] 2 Ch. 379, Mr. Hamilton comes to the conclusion that there is not any great danger in the normal practice of *not* searching before contract, unless the vendor's *bona fides* are in question, or a change of use of the premises which might conflict with a restrictive covenant is proposed. Searches should be made against every known estate owner since 1925 unless a previous certificate is held; this in itself strengthens the argument against searching before contract, as the names of previous estate owners would not then normally be known to the intending purchaser. In connection with the completion of the search form, the author points out that there is no express requirement in the rules that the land affected should be identified; as a matter of practice, however, this should be given where possible.

The booklet closes with a brief description of the Yorkshire Deeds Registries, and of the Agricultural Charges Register. It is pointed out that the latter refers only to charges on agricultural assets such as farming stock; but charges on agricultural land under the Agriculture Act, 1947, may be found in Part IX of the appropriate local land charges register.

J. F. G.

Bowstead's Digest of the Law of Agency. Eleventh edition. By Peter Allsop, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 302 pp. and index. (£2 10s.)

No work reaches an eleventh edition unless it is a good one. *Bowstead* is an old and trusted friend. Comparison with a much older edition shows that most of the main rules are still stated in the same form as they appeared many years ago. To have stood the test of time, and of independent editorship in later editions, is a reasonable proof of the accuracy of this Digest; and it well deserve its standing as an authoritative work on this subject. So far as it has been possible to judge from a short examination and checking of the contents, this work remains a reliable and accurate one.

Perhaps no review is complete without a few suggestions. One is that the subject of Acquiescence has been dealt with perhaps less fully than it deserves. In connection with Delegation and Ratification, one might reasonably have expected some reference to the important cases of *Blackpool Corporation* v. *Locker*, [1948] 1 All E. R. 85, and *Gordon Dodds & Co.* v. *Morris*, [1945] 2 All E. R. 616. At p. 44, the case of *Harben* v. *Phillips* (1883), 23 Ch. D. 14, might have been mentioned in addition to *Hooper* v. *Kerr*. One looks in vain for the "Illustration 6" which is referred to in footnote (b) on p. 69. Perusal of an earlier edition indicates that the paragraph on p. 70 commencing "Solicitors' Town Agents" is the illustration in question shorn of its number. The note following Article 23, which deals with "Authority to execute a deed", might usefully contain a reference to the provisions of section 74 of the L. P. A., 1925. As there is no index of Statutes it is possible that some reference to that section may be found under another heading, but if so the general index does not readily reveal that fact. In addition to the Articles, which together constitute a digest of the law of agency and to the illustrative decisions, the work contains a number of useful notes supplementing the Articles.

The comparative triviality of the critical observations in this review should be sufficient to satisfy intending purchasers that the eleventh edition is a worthy successor of former editions of this well-known work. It would be a phenomenon if a reviewer of a legal textbook were unable to allege any slight sin of commission or omission on the part of the author or editor.

E. O. W.

Periods of Limitation. By J. F. Josling. Oyez Practice Notes No. 25. London: Solicitors' Law Stationery Society, Ltd. 61 pp. (7s. 6d.).

The law of limitation of actions has been the subject of a great deal of recent legislation, and the ex-service man, or the older practitioner who has specialised and lost touch with other fields of law, will be grateful for this succinct monograph, which presents, at a glance, the appropriate periods of limitation in a number of subjects, alphabetically arranged, and with full documentation for further reference, being especially useful in the citation of very recent cases.

A few suggestions may be made which might improve the usefulness of this little book without unduly extending its length or defeating its object. The position of landlord and tenant under a formal lease for a fixed term (pp. 35, 36) is too tersely treated and may be misleading. Paragraph (b) on p. 36 should be broken down in slightly greater detail. Thus to describe a lessor as having an "estate in reversion" is not technically right, and to talk of "non-payment of rent" at large does not distinguish the position of the landlord under a long lease. The reader is left too much to his own devices. On p. 26 it is stated that easements are not dealt with by the law of limitation. But disturbance of an easement is an actionable tort, and this should be pointed out. The law of prescription applies only to the acquisition of an easement in the first place. The law of limitation applies to the nuisance of disturbance of easements. On p. 42 it might be pointed out that a receiver's possession is probably attributed to the mortgagor so as to prevent time running against him, an important practical point. On the subject of dower and death duties a short interpolation on the effect of the A. E. A., 1925, and recent Finance Acts would be useful; though the text is not wrong it may be rather unrealistic. On p. 60 it might be mentioned that the "mistake" need not be that of the plaintiff. There is a misprint for "vicarious" on p. 14.

A. K. R. K.

The Trustees' Handbook. By J. A. R. Finlay. London: Sweet & Maxwell, Ltd. 1951. 170 pp. (10s. 6d.)

Mr. Finlay's modest work is not a mere condensation of the works of others, but an independent production, stressing the reasons for the rules and explaining their effects. It should be of great value to bank and corporate trustees and useful to law students (though the possibility of its use by lay trustees is problematical, since it is essentially a law book). Each problem is attacked with the confidence of an obviously experienced author, and the reader is made to understand the rules which are stated. Some of the best points, often misunderstood when reading larger works, are the clear limitations of the trustee's power to delegate (pp. 59, 62, 112), the trustee's claim to a release (p. 126), investment clauses (p. 98), "technical" breaches of trust (p. 42), beneficiaries' rights under a trust for sale (p. 83) and the effects of sections 57 and 61 of the Trustee Act, 1925 (pp. 43, 127).

There are occasional misprints (*e.g.*, p. 124, l. 7, "remedy"; p. 107, note (*e*) "Mackreth").

A. K. R. K.

Local Authorities' Powers of Purchase.—A Summary. By A. S. Wisdom, Solicitor. 1951. The Justice of the Peace. (4s. net.)

This booklet sets out in twelve large pages the various purposes for which local authorities may exercise powers of compulsory purchase. Seventy different headings are given, with statutory references and brief observations. The utility of the work could have been improved by a different arrangement of the subject headings—for example, headings 11 and 14 on Commons; 5, 15 and 16 on Burial Grounds; and 20 and 62 on Ferries, might well have been co-ordinated.